No. 15-138

Title:	RJR Nabisco, Inc., et al., Petitioners v. The European Community, et al.
Docketed:	July 30, 2015
Linked with 15A24	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(11-2475-cv)
Decision Date:	August 20, 2014
Rehearing Denied:	April13, 2015

Questions Presented

---Date---	------Proceedings and Orders----------
Jul 2 2015	Application (15A24) to extend the time to file a petition for a writ of certiorari from July 12, 2015 to July 27,2015, submitted to Justice Ginsburg.
Jul 6 2015	Application (15A24) granted by Justice Ginsburg extending the time to file until July 27, 2015.
Jul 27 2015	Petition for a writ of certiorari filed. (Response due August 31,2015)
Aug 21 2015	Brief of respondents The European Community, et al.in opposition filed.
Aug 31 2015	Motion for leave to file amicus brief filed by Washington Legal Foundation.
Sep 9 2015	DISTRIBUTED for Conference of September 28,2015.
Sep 9 2015	Reply of petitioners RJR Nabisco, Inc., et al. filed. (Distributed)
Oct 1 2015	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Oct 1 2015	Petition GRANTED. Justice Sotomayor took no part in the consideration or decision of this petition.
Nov 5 2015	Motion to dispense with printing the joint appendix filed by petitioners RJR Nabisco, Inc., et al.
Nov 6 2015	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioners.
Nov 9 2015	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Nov 10 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 1,2015.
Nov 10 2015	The time to file respondents' brief on the merits is extended to and including January 15,2016.
Nov 25 2015	Further extension of time within which to file the joint appendix and petitioners' brief on the merits to and including December 11,2015.
Nov 25 2015	Further extension of time within which to file respondents' brief on the merits to and including February 4, 2016.
Nov 30 2015	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.

Dec 11 2015	Brief of petitioners RJR Nabisco, Inc., et al. filed.
Dec 18 2015	Brief amicus curiae of United States in support of vacatur filed.
Dec 18 2015	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed.
Dec 18 2015	Brief amicus curiae of The National Foreign Trade Council filed.
Jan 29 2016	SET FOR ARGUMENT ON Monday, March 21, 2016
Feb 4 2016	Brief of respondents The European Community, et al. filed.
Feb 8 2016	Record requested from U.S.C.A. 2nd Circuit.
Feb 8 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 10 2016	CIRCULATED.
Feb 10 2016	Record received from U.S.C.A. 2nd Circuit is electronic.
Feb 11 2016	Record from U.S.D.C. Eastern District of New York is electronic and located on PACER. Transcripts not available on PACER are electronic.
Feb 29 2016	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Sotomayor took no part in the consideration or decision of this motion.
Feb 29 2016	Letter from counsel for the respondents regarding filing in the district court. (Distributed)
Mar 7 2016	Reply of petitioners RJR Nabisco, Inc., et al. filed. (Distributed)
Mar 21 2016	Argued. For petitioners: Gregory G. Katsas, Washington, D.C. For United States as amicus curiae in support of vacatur: Elaine J. Goldenberg, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondents: David C. Frederick, Washington, D. C.
Jun 20 2016	Judgment REVERSED and case REMANDED. Alito, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy and Thomas, JJ., joined, and in which Ginsburg, Breyer, and Kagan, JJ., joined as to Parts I, II, and III. Ginsburg, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment, in which Breyer and Kagan, JJ., joined. Breyer, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment. Sotomayor, J., took no part in the consideration or decision of the case.
Jul 22 2016	JUDGMENT ISSUED

15-138

No. 15-___

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners.

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants and Appellees in the courts below, are R. J. Reynolds Tobacco Company (a North Carolina corporation); RJR Nabisco, Inc.; RJR Acquisition Corp.; RJR Nabisco Holdings Corp.; R.J. Reynolds Tobacco Holdings, Inc.; R. J. Reynolds Global Products, Inc.; Reynolds American Inc.; and R. J. Reynolds Tobacco Company (a New Jersey corporation).

Respondents, who were Plaintiffs and Appellants in the courts below, are the European Community, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cypress, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden.

Pursuant to this Court's Rule 29.6, petitioners declare as follows:

R. J. Reynolds Tobacco Company (a North Carolina corporation) is successor by merger to R. J. Reynolds Tobacco Company (a New Jersey corporation) and is a wholly-owned subsidiary of R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc. R.J. Reynolds Tobacco Holdings, Inc. is a wholly-owned subsidiary of Reynolds American Inc. ("RAI"), a publicly held corporation.

R. J. Reynolds Global Products, Inc., is an indirect, wholly-owned subsidiary of RAI, a publicly held corporation.

RJR Acquisition Corp., f/k/a Nabisco Group Holdings Corp., f/k/a RJR Nabisco Holdings Corp., merged into R.J. Reynolds Tobacco Holdings, Inc., f/k/a RJR Nabisco, Inc.

British American Tobacco p.l.c. and its subsidiaries collectively own more than 10% of the common stock of RAI.

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OPINIONS BELOW

The district court's opinion dismissing the RICO claims in this case (Pet.App. 37a) appears at 2011 U.S. Dist. LEXIS 23538. The Second Circuit's merits opinion (Pet.App. 1a) is reported at 764 F.3d 129, and its opinion denying panel rehearing (Pet.App. 55a) is reported at 764 F.3d 149. The five opinions respecting the denial of rehearing en banc (Pet.App. 59a) are reported at 783 F.3d 123.

JURISDICTION

The Second Circuit entered judgment on April 23, 2014. Pet.App. 1a. The panel denied rehearing and amended its opinion on August 20, 2014. Pet.App. 55a. The Second Circuit denied rehearing en banc on April 13, 2015. Pet.App. 59a. On July 6, 2015, Justice Ginsburg extended the time for filing this petition to and including July 27, 2015. Application No. 15A24. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of RICO is set forth in the appendix. Pet.App. 105a.

STATEMENT OF THE CASE

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court emphatically reaffirmed the presumption that federal statutes do not apply extraterritorially, chided the Second Circuit for its repeated disregard of that presumption, and squarely held that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. Applying the presumption, this Court further held that § 10(b) of the Securities

Exchange Act of 1934 has as its "focus" the purchase and sale of securities, and thus applies only to domestic purchases and sales. *See id.* at 265-70. Accordingly, the Court ordered dismissal of a "foreign cubed" complaint alleging that a foreign defendant had defrauded a foreign plaintiff in connection with a foreign securities transaction. *Id.*

This case presents the question whether RICO applies extraterritorially, and if so to what extent. Between *Morrison* and the decision below, dozens of lower-court decisions—including one from the Ninth Circuit—uniformly held that "RICO does not apply extraterritorially." *United States v. Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013). Yet the panel in this case, in one fell swoop, extended RICO to foreign racketeering activity, foreign enterprises, *and* foreign injuries. In four separate opinions, five judges dissented from the denial of en banc to reconsider that breathtaking, foreign-cubed expansion of a major federal statute that itself sweepingly extends to scores of criminal offenses.

1. RICO, 18 U.S.C. § 1961 *et seq.*, prohibits four categories of conduct involving covered enterprises and patterns of racketeering activity. Section 1962(a) makes it unlawful for any person to invest income derived from a "pattern of racketeering activity" in an "enterprise." Section 1962(b) makes it unlawful for any person to acquire an "enterprise" through a "pattern of racketeering activity." Section 1962(c) makes it unlawful for any person to conduct the affairs of an "enterprise" through a "pattern of racketeering activity." Finally, § 1962(d) makes it unlawful for any person to conspire to violate any of the three preceding provisions.

RICO specifically defines the critical statutory terms of "enterprise" and "pattern of racketeering activity." A covered "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). A covered "pattern of racketeering" consists of "at least two acts of racketeering activity" committed within ten years of one another. *Id.* § 1961(5). In turn, "racketeering activity" is defined to include "any act which is indictable under any of the following provisions of title 18," followed by a string-cite to well over 100 provisions. *Id.* § 1961(1)(B). That list includes many predicate offenses that apply only domestically, such as mail fraud, wire fraud, and the Travel Act, *id.* §§ 1341, 1343, 1952; some predicate offenses that apply both domestically and extraterritorially, such as money laundering and providing material support to foreign terrorist organizations, *id.* §§ 1956-57, 2332b(g)(5)(B), 2339B; and a few predicate offenses that apply only extraterritorially, such as the prohibition on engaging in illicit sexual activity "in foreign places," *id.* § 2423(c). RICO itself, however, is silent as to its own geographic scope.

RICO provides for a range of criminal and civil enforcement. Section 1963 imposes criminal penalties for violations of § 1962. Sections 1964(a) and (b) authorize the Attorney General to bring civil actions to prevent and restrain such violations. Finally, and most relevant here, § 1964(c) affords a private right of action—plus treble damages and attorneys' fees—to "[a]ny person injured in his business or property by reason of a violation of section 1962."

2. Petitioners in this case are the R.J. Reynolds Tobacco Company and various of its affiliated corporations. Respondents are the European Community ("EC") (now the European Union) and 26 of its Member States. Respondents sued petitioners under RICO; they allege that petitioners were involved in a worldwide scheme to launder the proceeds of illegal drug sales in Europe, and that this money-laundering scheme caused various harms to European governments in Europe.[1]

The alleged money-laundering scheme consisted of at least five discrete sets of transactions. First, foreign drug traffickers, located in Afghanistan, Colombia, the Middle East, and Russia, smuggled illegal narcotics into Europe and sold them there for Euros. Pet.App. 153a-154a. Second, the drug traffickers traded those Euros for other foreign currencies, in transactions with black-market money brokers also located in Europe. Pet.App. 156a-157a. Third, the money brokers sold the Euros to European cigarette importers. Pet.App. 157a.

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[1] The operative complaint in this case is the sixth filed by the EC in a series of successive cases. The first case, filed by the EC alone, was dismissed on the ground that the EC is not a proper party to complain about alleged injuries to its Member States. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 501-02 (E.D.N.Y. 2001). The second case, filed by the EC and 10 Member States, was dismissed on the ground that it sought recovery for the sovereign injuries of foreign governments, in violation of the revenue rule. *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 236-45 (E.D.N.Y. 2002), *aff'd sub nom. European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated*, 544 U.S. 1012 (2005), *adhered to on remand*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.). These prior dismissals are not at issue here.

Fourth, the European importers used the funds to purchase cigarettes from cigarette wholesalers. *Id.* Fifth, the wholesalers in turn purchased cigarettes from petitioners, and shipped those cigarettes to the importers for retail sale in Europe. Pet.App. 159a-160a. According to the complaint, the cigarette wholesalers with whom petitioners conducted business were located in such foreign countries as Colombia, Croatia, Panama, and Venezuela. Pet.App. 167a, 172a, 175a, 177a, 191a-192a. The complaint also alleges that petitioners unlawfully sold cigarettes in Iraq, in territory controlled by a foreign terrorist organization. Pet.App. 178a-182a.

The complaint alleges a RICO "enterprise" made up of petitioners, drug traffickers, and "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" in the scheme described above. Pet.App. 238a-239a. It alleges a "pattern of racketeering activity" consisting of predicate acts of money laundering, mail fraud, wire fraud, Travel Act violations, and providing material support to foreign terrorist organizations. Pet.App. 239a-251a. The RICO violations allegedly caused 36 different injuries to European governments in Europe—including lost tax revenue, increased law-enforcement costs, various harms to their respective economies, and reduced profits to their state-owned tobacco businesses. Pet.App. 211a-228a.

3. The district court dismissed the RICO claims as impermissibly extraterritorial. Applying *Morrison*, the court reasoned that because "RICO is silent as to any extraterritorial application," it therefore "has none." Pet.App. 44a. Further applying *Morrison*, the court looked to the "focus" of RICO to determine

what constitutes a permissible domestic application of the statute. Pet.App. 45a-48a. The court held that, because RICO is focused on the "enterprise" that conducts or is affected by racketeering, the statute extends only to domestic enterprises. *Id.*

The court then concluded that the complaint in this case does not allege a domestic enterprise. To determine where an enterprise is located, the court applied the "nerve center" test from *Hertz Corp. v. Friend*, 559 U.S. 79 (2010), which focuses on where the corporation or enterprise is controlled. Pet.App. 48a. Here, the alleged money-laundering enterprise was controlled by foreign narcotics traffickers, with petitioners alleged to be "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a.

4. On appeal, a panel of the Second Circuit reversed. Neither side—nor the United States as amicus—asked the court to hold that RICO applies extraterritorially. Rather, the only disputed issue was what constitutes a permissible domestic application of RICO. Yet the court of appeals, taking a different view from those expressed by the litigants and by all prior decisions, held that RICO *does* apply extraterritorially. Its original opinion extended the substantive provisions of RICO to extraterritorial patterns of racketeering activity and extraterritorial enterprises, and its opinion on rehearing further extended civil RICO to extraterritorial injuries. Thus, that court's ultimate rule was that civil RICO extends to *foreign* racketeering activity carried out by *foreign* enterprises and causing *foreign* injuries.

First, the panel extended RICO to extraterritorial patterns of racketeering activity. It held that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that, by "incorporating" extraterritorial statutes "into RICO" as predicate acts of racketeering, Congress "clearly communicated its intention" that RICO itself apply extraterritorially. Pet.App. 11a. Moreover, the panel further reasoned that if RICO covered only domestic patterns of racketeering, then Congress's decision to incorporate exclusively extraterritorial predicate statutes would be inexplicable. Pet.App. 10a. In so extending RICO, the court severely limited its own prior precedent in *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam), which had held that "RICO is silent as to any extraterritorial application," *id.* at 33 (citation omitted), and that, "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none,'" *id.* (quoting *Morrison*, 561 U.S. at 255).

Next, the panel extended RICO to foreign enterprises. Without citing any textual basis, it reasoned that limiting RICO to domestic enterprises would be an "illogical" policy, because "[s]urely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States." Pet.App. 14a.

Applying these rules, the panel held that the RICO counts in this case state viable claims. The panel reasoned that, because the money-laundering and material-support statutes by their terms apply

extraterritorially, RICO likewise applies to extraterritorial patterns of racketeering activity predicated on violations of those statutes. Pet.App. 17a-18a. The court acknowledged that the mail fraud, wire fraud, and Travel Act statutes do not apply extraterritorially, but it held that the complaint adequately alleged domestic violations of those statutes. Pet.App. 18a-24a.[2]

5. Petitioners sought rehearing on the ground that the panel had ignored one of their principal contentions—that regardless of the geographic scope of § 1962, plaintiffs seeking treble damages under § 1964(c) must allege a domestic injury.

In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries. It reasoned that § 1964(c) extends to any injury "caused by predicate acts sufficiently related to constitute a pattern." Pet.App. 56a (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)). The panel further reasoned that the presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," and thus does not apply to the question whether a statutory private right of action extends to extraterritorial injuries. Pet.App. 58a.

6. Petitioners sought rehearing en banc. More than seven months later, the court denied it by an 8-5 vote, which prompted one published concurrence and four published dissents.

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[2] The court further held that the district court had erred in dismissing respondents' state-law claims for lack of subject-matter jurisdiction. Pet.App. 24a-36a; *see also* 814 F. Supp. 2d 189 (E.D.N.Y. 2011). That holding is not at issue here.

Judge Jacobs, writing for all five dissenters, argued that further review was appropriate given the "frequency of RICO litigation" in the Second Circuit and the "taut tension" between the panel opinion and prior decisions. Pet.App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, explained that the panel decision was "flatly inconsistent with years of precedent" from this Court, which "treats RICO as an offense distinct from its predicate acts." Pet.App. 71a. "Although it is indisputable that Congress intended for certain RICO predicate statutes to apply to actions or events abroad, there is no clear basis for concluding that Congress intended for RICO itself to go along with them." *Id.* He summarized things as follows: "After more than four decades of experience with [RICO], a panel of our court has discovered and announced a new, and potentially far-reaching, judicial interpretation of the statute—one that finds little support in this history of the statute, its implementation, or the precedents of the Supreme Court; that will encourage a new litigation industry exposing business activities abroad to civil claims of 'racketeering'; and that will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (footnotes omitted).

Judge Raggi, writing for the same four judges, further explained that the panel had misapplied *Morrison* and created a circuit split in doing so: "Since [*Morrison*], courts in this circuit and around the nation uniformly have held that [RICO] does not apply extraterritorially. These courts have sometimes differed in how they determined whether

a particular RICO application was domestic or extraterritorial, but their underlying assumption has been consistent: 'RICO is silent as to any extraterritorial application' and, therefore, 'it has none.'" Pet.App. 74a (quoting *Norex*, 631 F.3d at 33, and *Morrison*, 561 U.S. at 255). Accordingly, she urged further review both on the threshold question whether "RICO applies extraterritorially" at all and on the "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet.App. 77a.[3]

REASONS FOR GRANTING THE PETITION

Five years ago, this Court decisively rejected the "conduct" and "effects" tests previously used by the Second Circuit to determine the extraterritorial reach of various federal statutes, including the securities laws and RICO. *See Morrison*, 561 U.S. at 255-61. In their place, this Court required a two-step analysis more consistent with the presumption against extraterritoriality. First, to determine whether the presumption is overcome, a court must decide whether the statute at issue contains any "clear indication" that it applies extraterritorially. *Id.* at 255, 265. If not, the court then must determine what qualifies as a domestic application of the statute at issue. *See id.* at 266. To do so, it must identify what elements are the "focus" of the statute, and those elements apply only domestically. *See id.* at 268. Thus, because § 10(b) of the Exchange Act

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[3] Separately dissenting, Judge Lynch agreed that the panel decision was "deeply in tension" with *Norex*, but reserved judgment on which of the two is correct. Pet.App. 103a. Only Judge Hall—a member of the original panel—defended the panel opinion. Pet.App. 60a.

focuses on the purchase and sale of securities, it applies only to domestic purchases and sales of securities (or to purchases and sales of securities listed on a U.S. exchange), regardless of where any fraudulent conduct occurred or where the plaintiff or defendant resides. *See id.* at 269-70.

In seeking to apply the *Morrison* framework to RICO, the lower courts have reached broad agreement in one respect, but are deeply divided in another. Prior to the panel decision below, the courts had unanimously concluded at step one of *Morrison* that RICO "does not apply extraterritorially." *Xu*, 706 F.3d at 974-75. At step two, however, the courts sharply divided over how to distinguish between domestic and extraterritorial applications. The Ninth Circuit and numerous district courts concluded that the sole "focus" of RICO is the pattern of racketeering activity. These courts thus held that RICO applies only to domestic racketeering, but extends to foreign enterprises. Other courts, including the district court below, concluded that the "focus" of RICO is the enterprise, and thus held that RICO applies only to domestic enterprises, but extends to foreign racketeering. The United States, for its part, argued below that the "focus" of RICO is *both* the pattern of racketeering and the enterprise, and that § 1962 thus applies if *either* of them is domestic. Br. for United States as *Amicus Curiae* in Support of Neither Party 9-15, *RJR Nabisco, Inc.*, 764 F.3d 129 (No. 11-2475) ("U.S. Br."). And no court, to our knowledge, had extended RICO's civil cause of action to extraterritorial injuries.

In this case, the Second Circuit held, contrary to the Ninth Circuit and every other court to have

considered the issue, that there *is* a "clear indication" that RICO applies to extraterritorial patterns of racketeering activity, at least to the same extent as do the underlying predicate offenses. Moreover, the court further extended RICO to extraterritorial enterprises and injuries, thus authorizing civil RICO actions based on *foreign* patterns of racketeering conducted through *foreign* enterprises and causing *foreign* injuries. This is just such a case: The complaint alleges a far-flung scheme in which narcotics traffickers located in South America, Europe, and Asia laundered proceeds from illegal drug sales in Europe and thereby caused harm to European governments in Europe. Only under the Second Circuit's novel and expansive approach would such allegations state a claim under civil RICO.

This Court's intervention is warranted for four reasons. *First*, the lower courts are now divided on both the threshold question whether RICO applies extraterritorially at all and on the related question of which elements of a civil RICO claim must be domestic. *Second*, the question of RICO's geographic scope is recurring and important—which is why the United States filed an unsolicited amicus brief below, and why five circuit judges urged rehearing en banc. *Third*, this case presents an ideal vehicle for resolving that question: The lengthy opinions below fully address all the pertinent issues, and the case squarely implicates all the statutory elements (enterprise, pattern, *and* injury) that might constitute the relevant "focus" of civil RICO. *Fourth*, the Second Circuit's approach is profoundly wrong: Its foreign-cubed expansion of RICO misreads the statute, contravenes *Morrison*, and once again degrades the presumption against extraterritoriality.

I. THE LOWER COURTS ARE DEEPLY DIVIDED OVER WHETHER AND HOW RICO APPLIES EXTRATERRITORIALLY

Even before the panel decision below, courts and commentators had noted the confusion in the lower courts over how to apply *Morrison* to RICO. *See, e.g.*, *Borich v. BP, P.L.C.*, 904 F. Supp. 2d 855, 861 (N.D. Ill. 2012) ("courts have divided" on issue); Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543, 544 (2013) (courts "have split sharply"). And the opinion below significantly deepened the split, by introducing yet another approach that expands RICO's geographic reach even farther. This Court's review is needed to resolve this three-way conflict and to clarify the outer bounds of RICO's potent civil cause of action.

A. *Morrison* Rejected The "Conduct" And "Effects" Tests That Lower Courts Had Used To Determine RICO's Extraterritorial Scope

1. *Morrison* considered whether and how § 10(b) of the Exchange Act applies to foreign conduct. For decades, the lower courts, following the lead of the Second Circuit, had used a combination of two "complex" and "unpredictable" tests to determine which extraterritorial securities frauds were covered. *Morrison*, 561 U.S. at 256. An "effects test" asked whether the conduct had a "substantial effect" in the United States, and a "conduct test" asked whether material or significant contributing conduct occurred in this country. *See id.* at 257-58. The courts used that same analysis to determine the extraterritorial scope of various other federal statutes, including RICO. *See, e.g.*, *id.*; *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996).

This Court squarely rejected those tests as "unpredictable," "inconsistent," without basis in statutory text, and contrary to the longstanding presumption that Congress does *not* generally mean to apply federal statutes extraterritorially. *See* 561 U.S. at 260-61. In their place, the Court set forth a different approach that would "preserv[e] a stable background against which Congress can legislate." *Id.* at 261.

In particular, the Court first asked whether the presumption against extraterritoriality had been overcome by some "affirmative indication" in the statute, such as "a clear statement of extraterritorial effect" or "clear indication" from other "sources of statutory meaning." *Id.* at 265. For § 10(b) of the Exchange Act, the answer was no—despite its "reference to foreign commerce," another reference to foreign countries in the Act's statement of purposes, and a statutory exception that appeared to presume some extraterritorial application. *Id.* at 263. None of those features sufficed as a "clear" and "affirmative" indication of extraterritorial coverage to rebut the presumption. *See id.* at 265.

After concluding that § 10(b) does not "apply extraterritorially," the Court next inquired whether the disputed application was extraterritorial or domestic. *Id.* at 266. After all, applying the presumption against extraterritoriality is often "not self-evidently dispositive," for "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* The critical second question is thus: What connection to the United States is necessary to make the contested application *domestic*?

The Court made clear that one cannot evade the presumption against extraterritorially simply by alleging "*some* domestic activity." *Id.* Rather, "the focus" of the statutory provision—the element or elements that are "the objects of the statute's solicitude"—must be domestic in the disputed application at issue. *Id.* at 267. Thus, because the "focus" of § 10(b) is on "transactions in securities," a domestic application of that provision is one that involves transactions in the United States or securities sold on United States exchanges. *Id.* Accordingly, § 10(b) applies only to such domestic transactions, and the presence of upstream or downstream conduct or effects in the United States does not extend that provision to otherwise extraterritorial transactions. *See id.* at 266-70.

2. *Morrison* significantly changed the law used by lower courts to determine the geographic scope of RICO. As noted above, the courts of appeals had previously applied the same "conduct" and "effects" tests that *Morrison* condemned. *See* Mark, *supra*, at 543 ("courts commonly analyzed RICO's extraterritoriality by borrowing two tests from securities and antitrust law—'conduct' and 'effects'"); *Al-Turki*, 100 F.3d at 1051 (using conduct and effects tests to determine extraterritorial scope of RICO); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004) (in RICO case, looking to "tests used to assess the extraterritorial application of the securities laws"). By emphatically rejecting the "conduct" and "effects" tests, *Morrison* "threw the tests for extraterritorial application of RICO into flux." Anneka Huntley, *RICO's Extraterritoriality After Morrison: Where Should We Go from Here?*, 65 HASTINGS L.J. 1691, 1700-01 (2014).

B. Most Courts Now Refuse To Apply RICO Extraterritorially, But Disagree On What Constitutes A Domestic Application

In attempting to apply *Morrison* to RICO, "the lower courts have been 'all over the board' producing 'the very confusion and variation in standards' the Supreme Court hoped to remedy by rendering the decision." Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. INT'L BUS. & L. 33, 34 (2015). Until the panel decision in this case, courts "around the nation uniformly ha[d] held that [RICO] does not apply extraterritorially," since the statute contains no clear indication of any extraterritorial sweep. Pet.App. 74a (Raggi, J., dissenting from denial of en banc). But the courts disagreed about what is RICO's "focus," and thus divided on the equally important question of what constitutes a "domestic" application of the statute.

1. Prior to the decision below, every court to consider the question had held, under the first step of *Morrison*, that RICO contains no "clear indication of an extraterritorial application" and therefore "has none." 561 U.S. at 255.

In *Xu*, the Ninth Circuit squarely held that RICO does not apply extraterritorially. As that court explained, "courts that have addressed the issue" since *Morrison* "have uniformly held that RICO does not apply extraterritorially." 706 F.3d at 974. The Ninth Circuit embraced these decisions as "faithful to *Morrison*'s rationale"—because "RICO is silent as to its extraterritorial application," it follows that "RICO does not apply extraterritorially in a civil or criminal context." *Id.* at 974-75. Likewise, in *CGC*

Holding Co. v. Broad & Cassel, the Tenth Circuit noted uniform precedent, the district court's holding, and the parties' agreement "that RICO does not apply extraterritorially." 773 F.3d 1076, 1097 (10th Cir. 2014). The court then discussed at length the division of authority on the step-two question of "identifying the 'focus' of RICO," which determines what constitutes a domestic application, but ultimately reserved judgment on that latter question. *See id.* at 1097-98.

District courts across the country likewise have held that RICO does not apply extraterritorially. *E.g.*, *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 164 (D.D.C. 2013) ("courts have uniformly concluded" that "RICO does not apply extraterritorially"); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 937 (N.D. Cal. 2012) ("courts have uniformly held that RICO is silent as to its extraterritorial application and that, under *Morrison*, it therefore has none"); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1348 (S.D. Fla. 2012) ("Sosa argues that, because RICO ... is silent with respect to extraterritorial application, it has no such application. Every court to consider this argument after *Morrison* has embraced it."); *Adhikari v. Daoud & Partners*, No. 09-cv-1237, 2013 U.S. Dist. LEXIS 189601, at *23 (S.D. Tex. Aug. 23, 2013) ("post-*Morrison* courts have uniformly held that RICO does not apply extraterritorially"); *In re Le-Nature's, Inc. v. Krones, Inc.*, No. 09-cv-1445, 2011 U.S. Dist. LEXIS 56682, at *13-14 (W.D. Pa. May 26, 2011) ("Because the RICO statute does not contain evidence that Congress intended extraterritorial

application, *Morrison* has been held to preclude such application.").[4]

2. While the lower courts had agreed that RICO does not apply extraterritorially, they disagreed at *Morrison*'s important second step—*i.e.*, how to distinguish a permissible domestic application of RICO from an impermissible extraterritorial one. As *Morrison* explained, applying the presumption often "requires further analysis," because merely alleging "*some* domestic activity" is not sufficient to establish the domestic application of a statute. 561 U.S. at 266. Rather, the domestic activity must encompass the statutory "focus." *Id.* But the lower courts have found it "unclear how *Morrison*'s logic ... precisely translates to RICO." *Toyota Motor*, 785 F. Supp. 2d at 914-15.

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[4] *See also In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 731 (S.D.N.Y. 2013) ("RICO does not apply extraterritorially."); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 543 (S.D.N.Y. 2013) ("The RICO statutes do not apply extraterritorially."); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 239 (S.D.N.Y. 2012) ("presumption against extraterritorial application governs in RICO cases"); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011) ("there can be no dispute that RICO is silent as to its extraterritorial application" and thus "RICO *does not* apply extraterritorially"); *United States v. Philip Morris USA, Inc.*, 783 F. Supp. 2d 23, 28-29 (D.D.C. 2011) ("there is no evidence that Congress intended to criminalize foreign racketeering activities under RICO"); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010) (RICO not "sufficiently clear to overcome the presumption against extraterritoriality"); *Goodwin v. Bruggeman-Hatch*, No. 13-cv-02973, 2014 U.S. Dist. LEXIS 108911, at *23 (D. Colo. June 2, 2014) ("RICO does not apply to extraterritorial conduct").

In particular, a conflict developed between two alternative approaches. *See Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 571 (S.D.N.Y. 2014) ("The decisions to have considered the matter have taken essentially one of two approaches to determining whether application of RICO to situations involving conduct both in the United States and abroad would be extraterritorial."). Some courts, including the Ninth Circuit, held that the sole statutory focus of RICO is the "pattern of racketeering activity," so that RICO requires a domestic pattern but not a domestic enterprise. Other courts, like the district court below, concluded that RICO is focused on the "enterprise" affected or implicated by racketeering, so that RICO covers only domestic enterprises. Finally, some commentators and parties (including petitioners) have argued that the "focus" of a *civil* cause of action under RICO is the plaintiff's injury, so that § 1964(c) applies only to domestic injuries. Prior to the decision below, no court (to our knowledge) had addressed that contention one way or the other.

a. The Ninth Circuit and various district courts in other circuits have held that RICO applies only to domestic patterns of racketeering activity.

In *Xu*, the Ninth Circuit explained that courts to have addressed the issue have "fall[en] essentially into two camps"—one looking solely to the location of the enterprise, the other solely to the location of the pattern of racketeering activity. 706 F.3d at 975. After thorough analysis, it rejected the former and adopted the latter. *Id.* at 977. The Ninth Circuit described RICO as designed to "punish patterns of organized criminal activity in the United States." *Id.*

at 978. By contrast, that court criticized the "enterprise" test, despite its "administrative ease, familiarity, and consistency," as promoting what the court regarded as "absurd results"—*i.e.*, immunizing foreign groups carrying out illegal acts in the United States. *Id.* at 977.

Applying these principles, the Ninth Circuit held that the pattern of racketeering activity alleged in the *Xu* case, "to the extent it was predicated on extraterritorial activity" in China, was "beyond the reach of RICO." *Id.* at 978. Moreover, the court reached that conclusion even though the predicate acts included a money-laundering conspiracy. *See id.* at 973, 993. On the other hand, § 1962 did apply to the extent that the "pattern of racketeering activity" was "executed and perpetrated in the United States." *Id.* at 979. The court thus held that it was "constitutional error" to allow the jury to convict the defendants based on "extraterritorial activity," but it ultimately concluded that this error was harmless. *Id.* at 979 n.2. Finally, the court concluded that the location of what it described as the "international enterprise" at issue (*id.* at 974) was irrelevant to the geographic scope of RICO. *See id.* at 978-79. *See also Howard v. Maximus, Inc.*, No. 3:13-cv-01111, 2014 U.S. Dist. LEXIS 109199, at *13-14 (D. Ore. May 6, 2014) ("the Ninth Circuit chose to join those courts focusing on the location of the racketeering").

Various district courts have followed this same approach. In *CGC Holding Co. v. Hutchens*, for example, the court adopted the pattern test and refused to dismiss a RICO suit against an enterprise allegedly based in Canada, because the plaintiff had alleged a pattern of racketeering that "largely

occurred within the United States." 824 F. Supp. 2d 1193, 1209 (D. Colo. 2011). Conversely, in *Hourani*, the court adopted the pattern test and dismissed a RICO claim against a domestic enterprise because the alleged pattern of racketeering activity had occurred in Kazakhstan. 943 F. Supp. 2d at 165-66. And in *Borich*, which likewise concluded that the "proper focus" of RICO "is the pattern of racketeering activity," the court simply ignored the alleged "[f]oreign racketeering activity" in order to determine whether the plaintiff had stated a valid RICO claim. 904 F. Supp. 2d at 861-62.

b. Various other courts have held that the correct approach for determining RICO's territorial coverage is to assess the location of the enterprise. Under this approach, domestic enterprises may be liable for foreign acts of racketeering, but foreign enterprises are not liable for domestic acts of racketeering.

The enterprise approach was developed by Judge Rakoff, who literally wrote the book on RICO. *See* J. Rakoff & H. Goldstein, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (2015). In *Cedeno*, Judge Rakoff reasoned that the "focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity." 733 F. Supp. 2d at 474. He based that conclusion on the text and structure of RICO, which prohibits patterns of racketeering only insofar as they "impact an enterprise" in particular ways. *Id.* at 473-74. Accordingly, he concluded, RICO applies only to domestic enterprises. *Id.* at 474 ("RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign."). He therefore dismissed civil

RICO claims alleging that an enterprise based in Venezuela had committed a pattern of racketeering activity in part in the United States. *See id.*

Although *Cedeno* was superseded in the Second Circuit by the decision below, courts elsewhere have adopted its holding—again, with real practical consequences. For example, in *Le-Nature's*, a district court in Pennsylvania refused to dismiss a claim based on an alleged pattern of racketeering in Germany, because "the alleged enterprise was domestic, and within the ambit of RICO." 2011 U.S. Dist. LEXIS 56682, at *18. Conversely, a district court in Florida dismissed a RICO claim alleging that a Peruvian enterprise had carried out a pattern of racketeering activity in Florida. *See Sorota*, 842 F. Supp. 2d at 1350 (reasoning that plaintiff "alleges a foreign—not a domestic—RICO enterprise," leading to dismissal "regardless of where the predicate acts of racketeering occur"). *Accord Bhari Info. Tech. Sys. Private Ltd. v. Sriram*, 984 F. Supp. 2d 498, 504 (D. Md. 2013) (dismissing RICO claim where "the *enterprise* through which the RICO violations occurred" was not sufficiently domestic).

c. Finally, for private damages actions under RICO, a separate extraterritoriality question arises: whatever the geographic scope of the substantive provisions in § 1962, whether the cause of action in § 1964(c) extends to extraterritorial injuries.

Soon after *Morrison* was decided, one prominent commentator argued that its logic "should limit RICO's future application to cases in which the conduct of the foreign enterprise causes *injuries* in the U.S." John C. Coffee, Jr., *What Hath 'Morrison' Wrought?*, N.Y.L.J., Sept. 16, 2010 (emphasis added);

see also id. ("For the future, ... the appropriate focus should be whether victims were injured in the United States."). Prior to the decision below, no court (to our knowledge) had extended § 1964(c) to extraterritorial injuries, and not even the United States, as amicus below, sought such an extension. *See* U.S. Br. at 3 n.2.

C. The Second Circuit Held That RICO *Does* Apply Extraterritorially, And That *No* Domestic Link Need Be Alleged or Proved

The Second Circuit adopted none of these three possible positions. Instead, it entirely "untether[ed] RICO from its mooring on United States shores." Pet.App. 75a (Raggi, J., dissenting from denial of en banc). Accordingly, civil RICO claims based on *foreign* patterns of racketeering activity conducted through *foreign* enterprises and causing *foreign* injuries—the RICO equivalent to what Justice Stevens in *Morrison* called "foreign-cubed" securities suits, 561 U.S. at 283 n.11 (Stevens, J., concurring in judgment)—are now viable in the Second Circuit.

1. Although all other courts had readily concluded that RICO contains no clear indication of extraterritorial coverage, the panel held that "RICO applies extraterritorially" to the extent that "liability or guilt could attach to extraterritorial conduct under the relevant RICO predicates." Pet.App. 9a. The panel reasoned that Congress, by "explicitly incorporating" extraterritorial statutes into RICO's definition of "racketeering activity," thereby manifested a clear intent to give the "pattern of racketeering activity" comparable extraterritorial coverage. Pet.App. 9a-10a ("when a RICO claim depends on violations of a predicate statute that

manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too"). Thus, because the money-laundering and material-support statutes are expressly extraterritorial, *see* 18 U.S.C. §§ 1956(f), 2339B(d)(2), RICO covers patterns of racketeering activity predicated on the violation of those statutes.

Moreover, the panel further extended RICO to extraterritorial enterprises and injuries. Its original opinion did not dispute that the complaint had alleged a foreign enterprise, but rejected the requirement of a domestic enterprise as "illogical." Pet.App. 14a. Similarly, in denying panel rehearing, the panel squarely held that "RICO imposes no such requirement" of a "domestic injury." Pet.App. 55a.

As a result of those holdings, all of the RICO allegations in the complaint were held to state viable claims: Although the complaint was based on allegations that a foreign enterprise committed acts of racketeering abroad and injured European governments within their own territory, the complaint was viable simply because it alleged violations of extraterritorial criminal predicates.

2. The Second Circuit's triply-extraterritorial expansion of RICO conflicts with the rule *everywhere else*, and the conflict is not merely theoretical. For example, the indictment in *Xu* would now survive in the Second Circuit, because the racketeering predicates in China included money-laundering offenses, *see* 706 F.3d at 978—the same expressly extraterritorial offenses principally alleged here. So too would the claims that were dismissed in *Hourani*, where the plaintiffs alleged money laundering in Kazakhstan, 943 F. Supp. 2d at 160, 167; in *Iraq*,

where the plaintiffs alleged money laundering in Iraq, 920 F. Supp. 2d at 545-46; or in *Cedeno*, where the plaintiffs alleged money laundering in Venezuela, 733 F. Supp. 2d at 473.[5]

* * *

In sum, "[l]ower courts have been struggling to apply RICO extraterritorially in the absence of further guidance from the Supreme Court, and their efforts have produced a sharp split regarding how its reach should be discerned." Otey, *supra*, at 52. This three-way split on the extraterritorial scope of a major federal statute—with the Second Circuit taking the most radically expansive view—cannot be resolved without this Court's intervention.

II. THE QUESTION PRESENTED HAS GREAT SIGNIFICANCE

The geographic scope of RICO also warrants this Court's attention because it is recurring and important. RICO litigation is common, and the opinion below broadly opens the door for civil plaintiffs to target, in U.S. courts, business practices across the globe—thereby threatening the very international discord and litigation bonanza that *Morrison* sought to prevent.

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[5] The panel commented that its extension of RICO to extraterritorial *enterprises* "accords with" *Xu*, "although on different reasoning." Pet.App. 16a n.6. However, the panel neglected to mention that *Xu* expressly requires a domestic *pattern of racketeering activity*, 706 F. 3d at 975-79, whereas the panel here expressly rejected that requirement, Pet.App. 9a-14a.

A. The Extraterritorial Scope Of RICO Arises Frequently In Federal And State Courts

Judge Jacobs cited the "frequency of RICO litigation in this Circuit" as justifying further review by his court. Pet.App. 69a (dissenting from denial of en banc). By the same token, the frequency of RICO litigation nationwide is among the reasons why this Court should review the basic question about its geographic scope.

In just the five years since *Morrison*, three courts of appeals have discussed how to apply it to RICO (the Ninth Circuit in *Xu*, the Tenth in *CGC Holding*, and the Second in this and several other cases). More than a dozen district courts throughout the country have also done so. And even since the Second Circuit issued its decision below, a half-dozen cases in that circuit have relied on it—not just in the civil RICO context, but also by extending its analytical approach to other statutes. *E.g.*, *United States v. Ahmed*, No. 12-CR-661, 2015 U.S. Dist. LEXIS 36973, at *25 (E.D.N.Y. Mar. 24, 2015) (18 U.S.C. § 924(c) applies extraterritorially to same extent as its predicates).

Moreover, this question affects considerable *state*-court litigation, too. Many states have enacted their own versions of RICO, and federal authority is highly persuasive for courts applying those statutes. *See, e.g.*, *Arthur v. JP Morgan Chase Bank, N.A.*, 569 F. App'x 669, 681 & n.12 (11th Cir. 2014) (finding it "unlikely" that Florida Supreme Court would apply Florida's RICO statute extraterritorially in light of *Morrison*, since federal law is "persuasive when interpreting the Florida RICO Act").

B. The Decision Below Threatens The Adverse Impacts That The Presumption Against Extraterritoriality Is Designed To Prevent

The decision below also opens the door to a *type* of civil litigation that will adversely affect important American interests—which is exactly why *Morrison* presumed Congress did not authorize it.

Specifically, the panel decision "invite[s] our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (Cabranes, J., dissenting from denial of en banc). Its rule authorizes plaintiffs to sue for "overseas" conduct by a "foreign enterprise," Pet.App. 75a (Raggi, J., dissenting from denial of en banc)—even when nobody in the United States has suffered an injury. Reported cases confirm that this is not mere speculation. Citing the panel opinion, courts over the last year have permitted RICO claims based on everything from political oppression in Ukraine, *see Tymoshenko v. Firtash*, 57 F. Supp. 2d 311, 324-25 (S.D.N.Y. 2014) (allowing plaintiffs to amend complaint in light of panel opinion, despite prior dismissal on extraterritoriality grounds), to bribery of Venezuelan officials, *see Reich v. Lopez*, 38 F. Supp. 3d 436, 447-48 (S.D.N.Y. 2014). By contrast, before the panel decision, courts had dismissed RICO claims arising from, *e.g.*, a Jordanian entity's racketeering in the Middle East that harmed citizens of Nepal, *Adhikari*, 2013 U.S. Dist. LEXIS 189601, at *22-26; a money-laundering scheme in connection with the Oil-for-Food program that harmed the Republic of Iraq, *Iraq*, 920 F. Supp. 2d at 545-46; and an extortion and money-laundering operation in Kazakhstan that caused harm there,

Hourani, 943 F. Supp. 2d at 167-68. If filed in the Second Circuit today, those claims would survive. Pet.App. 72a n.8 (Cabranes, J., dissenting from denial of en banc) (describing panel as "welcom[ing] such claims into federal court"). The whole world is now the oyster of RICO plaintiffs' lawyers.

For two reasons, this global expansion of RICO will "have a significant and long-term adverse impact." Pet.App. 69a (Cabranes, J., dissenting from denial of en banc). *First*, as this Court warned in *Morrison*, it threatens to turn the United States into "the Shangri-La ... for lawyers" around the world. 561 U.S. at 270. Indeed, given RICO's authorization of treble damages and shifting of attorneys' fees, 18 U.S.C. § 1964(c)—as well as its status as "one of America's most powerful statutes," Otey, *supra*, at 34—the concern should be even greater for RICO than for securities claims. *Cf. Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991) ("Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device."). And RICO's broad venue rules, which permit suit in any district where the defendant "resides, is found, has an agent, or transacts his affairs" (18 U.S.C. § 1965(a)), will make it particularly easy for plaintiffs anywhere around the globe to file future RICO actions against large American corporations in New York. Hence Judge Cabranes' apt warning that the decision will "encourage a new litigation industry." Pet.App. 73a (dissenting from denial of en banc).

Second, extraterritorial application of U.S. law causes "clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248

(1991). That is certainly true of RICO: While the EC here seeks to invoke that statute overseas, any victory would be "pyrrhic," because "its citizens ... are among the likely targets of future RICO actions under the panel's interpretation of the statute." Pet.App. 70a (Cabranes, J., dissenting from denial of en banc). RICO's expansion thus poses a "danger of unwarranted judicial interference in the conduct of foreign policy." *Kiobel v. Royal Dutch Shell Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013).

In short, "[r]esolution to the question of RICO's extraterritorial reach is absolutely vital to American interests." Otey, *supra*, at 34.

III. THIS IS A GOOD VEHICLE TO ADDRESS RICO'S EXTRATERRITORIAL REACH

For three reasons, this is an ideal case to address the question presented: The issue manifestly matters; the facts vividly illustrate the effects of the panel's radical rule; and the various arguments were exhaustively developed below.

First, resolution of the question presented would materially affect disposition of this case. Limiting RICO to domestic *patterns* of racketeering activity would substantially narrow the case. As the panel itself acknowledged, much of this case rests on allegations of money laundering outside the United States. Pet.App. 4a, 16a. Limiting RICO to domestic *enterprises* also would substantially narrow the case. In fact, the only "enterprise" actually alleged in the complaint consists of an "association-in-fact" made up of petitioners, drug traffickers, and "associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" working together to launder the proceeds of illegal drug sales

in Europe. Pet.App. 239a. The district court squarely held that this alleged enterprise was foreign, Pet.App. 51a-52a, and the Second Circuit did not question that holding, Pet.App. 14a.[6] Finally, limiting civil RICO to domestic *injuries* would result in outright dismissal, as the complaint rests entirely on injuries allegedly suffered by respondents in Europe. Pet.App. 211a-228a. Thus, only under the Second Circuit's radically expansive approach could the complaint survive in anything remotely resembling its current form. (Of course, if this Court were to hold that RICO does not apply extraterritorially, and announce the appropriate rule for determining what constitutes a permissible domestic application of RICO, it could leave for the lower courts on remand the task of parsing the complaint to determine which small parts of it, if any, would survive.)

Second, the extreme facts of this case make it an ideal vehicle for appreciating the consequences of the Second Circuit's rule. As explained, respondents' claim rests principally on allegations of drug trafficking and money laundering in *Europe*, *South*

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[6] In denying rehearing, the panel briefly suggested that the complaint also states a violation of § 1962(a) based on the alleged investment of racketeering proceeds in a domestic "enterprise" defined as the Brown & Williamson Tobacco Company ("B&W"). Pet.App. 13a n.5. However, the § 1962(a) allegations in the complaint rest entirely on the foreign "association-in-fact" enterprise discussed above. Pet.App. 238a-239a, 252a-254a. More importantly, a claim under § 1962(a), if based on the investment in B&W, would not suggest any domestic enterprise that could support RICO claims under § 1962(b) or (c).

America, and *the Middle East*. At its heart is an alleged enterprise based in *Russia* and *Colombia*. And it alleges injuries to sovereign European nations in *Europe*. It is hard to imagine a case that Congress is less likely to have invited into U.S. courts. Yet, according to the panel below, Congress *clearly indicated* its intent to do so.

Third, the issue was exhaustively developed below. Petitioners moved to dismiss the complaint on extraterritoriality grounds; respondents opposed; petitioners replied; and the parties filed supplemental briefs after *Morrison* was decided. *See* Dkts. 84, 87, 95, 97, 99. The issue was exhaustively addressed in the opinion by the district court (Pet.App. 44a-52a); in an amicus filing by the United States; in two separate opinions by the Second Circuit panel (Pet.App. 7a-24a, 55a-58a); and in five separate opinions respecting the denial of en banc (Pet.App. 59a-104a). In sum, no further percolation is necessary to sharpen the question presented.

IV. THE DECISION BELOW IS WRONG

The panel decision misunderstands RICO, contravenes *Morrison*, and once again degrades the presumption against extraterritoriality. "RICO is silent as to its extraterritorial application." *Xu*, 706 F.3d at 974. That alone should end the inquiry, for "[w]hen a statute gives no clear indication of an extraterritorial application, *it has none*." *Morrison*, 561 U.S. at 255 (emphasis added). Yet here, rather than conclude that RICO has *no* extraterritorial reach, the panel below made it triply extraterritorial. Each of those extensions was wrong.

A. The "pattern of racketeering" provisions of RICO give no hint of an extraterritorial application,

as those provisions nowhere address their own geographic scope. To the contrary, RICO simply defines the predicate "racketeering activity" comprising the "pattern" as including "any" act that is indictable under vast swaths of Title 18. *See* 18 U.S.C. § 1961(1)(B). And, of course, "it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665.

The panel below nonetheless chose "to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes." Pet.App. 15a. It reasoned that any congressional intent to make a predicate statute extraterritorial necessarily carries over to RICO itself, with the courts effectively "looking through" to the underlying predicate statutes. *See id.*

The fundamental flaw in that approach is that RICO is not "an aggravating statute that simply adds new consequences to the predicate offenses." Pet.App. 77a (Raggi, J., dissenting from denial of en banc). To the contrary, "that premise, from which the rest of the panel's analysis flows," is "at odds" with various lines of precedent, including cases holding that prosecution for predicate offenses creates no double-jeopardy bar to a RICO prosecution. *Id.*; *see also* Pet.App. 71a (Cabranes, J., dissenting from denial of en banc) (RICO "prohibits distinct behavior"); *Cedeno*, 733 F. Supp. 2d at 474 ("RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts."). Accordingly, the clear congressional intent to make some predicate statutes extraterritorial cannot substitute for what *Morrison*

requires: clear congressional intent to make *RICO itself* extraterritorial. And the panel's contrary conclusion "may allow an end-run around the revivified presumption against extraterritoriality in *Morrison* and *Kiobel*." Pet.App. 71a (Cabranes, J., dissenting from denial of en banc).

Alternatively, the panel reasoned that the incorporation of predicate statutes that are *exclusively* extraterritorial would be nonsensical if RICO was limited to domestic patterns of racketeering activity. Pet.App. 10a. But, as Judge Raggi explained, foreign acts of racketeering, even if not independently actionable, can help show that domestic acts exhibit the necessary relatedness and continuity to constitute a pattern. Pet.App. 90a-91a (dissenting from denial of en banc); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239-41 (1989) (addressing relatedness and continuity). In any event, even if RICO extended to patterns of racketeering activity based on the violation of *exclusively* extraterritorial predicate statutes, that would provide no support for *further* extending RICO to patterns of racketeering activity based on violation of predicate statutes that apply domestically and extraterritorially, which do not even arguably raise the same concern about meaningless incorporation. That is so because, even where a statute has *some* extraterritorial effect, the presumption still "remains instructive" in determining its "*extent*." *Microsoft v. AT&T Corp.*, 550 U.S. 437, 456 (2007). And here, the alleged pattern of racketeering activity involves no predicate statutes that are exclusively extraterritorial.

B. The panel erred further in extending RICO to extraterritorial enterprises. In pertinent part, RICO defines covered enterprises as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). Not a word of that definition suggests extraterritorial application, much less does so clearly and affirmatively. *See Kiobel*, 133 S. Ct. at 1665. Nor, of course, do the panel's policy arguments about what might or might not be "illogical" (Pet.App. 14a). Moreover, the enterprise element of RICO cannot be dismissed as an ancillary detail far removed from the "'focus' of congressional concern." *Cf. Morrison*, 561 U.S. at 266. To the contrary, the "enterprise" is a central focus of RICO, as the United States correctly explained in its amicus brief. *See* U.S. Br. at 10 ("One focus of RICO is on enterprises.").

The United States further argued that, because § 1962 is focused on *both* its pattern and the enterprise elements, only *one* of them must be domestic. *See id.* at 12. That proposed rule is narrower than the one adopted by the panel, because the panel would apply RICO even if *neither* of those elements (nor the further element of injury) is domestic. But even the United States' narrower view makes little sense. *Morrison* holds that, absent some clear indication to the contrary, the "focus" of a statute is presumed to be domestic. *See* 561 U.S. at 266-69. Accordingly, if *both* the pattern and enterprise elements of § 1962 were deemed to be foci of RICO, then *both* of those elements must be domestic for RICO to apply.

C. The panel erred a third time in extending § 1964(c) to extraterritorial injuries. That provision affords a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." It is entirely silent as to its own geographic scope, and its "focus" is plainly the injury caused by a RICO violation, as opposed to the underlying violation separately addressed by § 1962. Moreover, even if the panel were correct that § 1962 applies extraterritorially, that would not suggest that § 1964(c) does so as well, just as the fact that § 30(a) of the Exchange Act applies extraterritorially in no way suggests that § 10(b) of that Act also does. *See Morrison*, 561 U.S. at 264-65. To the contrary, it would suggest just the opposite, by confirming that Congress, when it wanted, could speak with the requisite degree of clarity. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

Finally, the panel's invocation of *Sedima* (Pet.App. 56a) provides no support for its extension of § 1964(c) to extraterritorial injuries. That case held only that § 1964(c) does not implicitly require a "racketeering injury" akin to the "antitrust injury" required for private civil antitrust claims. *See* 473 U.S. at 493-500. It has nothing whatsoever to do with any question of extraterritoriality.

* * *

In short, *Morrison* requires a clear indication that RICO—and not just the distinct crimes defined as the predicates comprising racketeering activity—applies abroad. Because there is no such indication for *any* element of a civil RICO claim, and certainly not for *all three*, the panel's ruling erroneously stretches the statute far beyond its proper scope.

CONCLUSION

The petition for certiorari should be granted.

JULY 2015

Respectfully submitted,

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APPENDIX

APPENDIX A

European Cmty. v. RJR Nabisco, Inc.

United States Court of Appeals
for the Second Circuit

August Term, 2011

Argued: February 24, 2012

Decided: April 23, 2014

Corrected: April 29, 2014

Amended: August 20, 2014

Docket No. 11-2475-cv

Before: LEVAL, SACK, HALL, Circuit Judges.

Leval, *Circuit Judge*:

This is the latest installment in litigation brought by the European Community and twenty-six of its member states[1] (collectively "Plaintiffs") against RJR Nabisco, Inc., and related entities (collectively

[1] The member state plaintiffs are: the Kingdom of Belgium, the Republic of Finland, the French Republic, the Hellenic Republic, the Federal Republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, the Kingdom of Spain, the Kingdom of Denmark, the Czech Republic, the Republic of Lithuania, the Republic of Slovenia, the Republic of Malta, the Republic of Hungary, the Republic of Ireland, the Republic of Estonia, the Republic of Bulgaria, the Republic of Latvia, the Republic of Poland, the Republic of Austria, the Kingdom of Sweden, the Republic of Cyprus, the Slovak Republic, and Romania.

"RJR").[2] Plaintiffs appeal from the dismissal of their Second Amended Complaint (the "Complaint") by the United States District Court for the Eastern District of New York (Garaufis, J.). The principal issues they raise are (1) whether their claims under the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 *et seq.*, are impermissibly extraterritorial, and (2) whether the European Community qualifies as an organ of a foreign state for purposes of diversity jurisdiction under 28 U.S.C. §§ 1332, 1603. The Complaint alleges that RJR directed, managed, and controlled a global money-laundering scheme with organized crime groups in violation of the RICO statute, laundered money through New York-based financial institutions and repatriated the profits of the scheme to the United States, and committed various common law torts in violation of New York state law. The district court dismissed the RICO claims because it concluded that RICO has no extraterritorial application. The court dismissed the state law claims because it determined that the European Community did not qualify as an organ of a foreign state under 28 U.S.C. §§ 1332, 1603 so that its participation in the suit destroyed complete diversity, and thus deprived the court of jurisdiction over the state law claims.

We conclude that the district court erred in dismissing the federal and state law claims. We disagree with the district court's conclusion that RICO cannot apply to a foreign enterprise or to

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[2] The procedural history of this litigation was summarized by the district court. *See European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *1-2 (E.D.N.Y. Mar. 8, 2011).

extraterritorial conduct. Recognizing that there is a presumption against extraterritorial application of a U.S. statute unless Congress has clearly indicated that the statute applies extraterritorially, *see Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010), we conclude that, with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially. As to the other alleged offenses, the Complaint alleges sufficiently important domestic activity to come within RICO's coverage.

We believe that the district court also erred in ruling that the European Community's participation as a plaintiff in this lawsuit destroyed complete diversity. The European Community is an "agency or instrumentality of a foreign state" as that term is defined in 28 U.S.C. § 1603(b). It therefore qualifies as a "foreign state" for purposes of 28 U.S.C. § 1332(a)(4), and its suit against "citizens of a State or of different States" comes within the diversity jurisdiction.

BACKGROUND

According to the Complaint, the scheme alleged to violate RICO involves a multi-step process beginning with the smuggling of illegal narcotics into Europe by Colombian and Russian criminal organizations. The drugs are sold, producing revenue in euros, which the criminal organizations "launder" by using money brokers in Europe to exchange the euros for the domestic currency of the criminal organizations' home countries. The money brokers then sell the euros to cigarette importers at a discounted rate. The cigarette importers use these euros to purchase

RJR's cigarettes from wholesalers or "cut-outs." The wholesalers then purchase the cigarettes from RJR and ship the cigarettes to the importers who purchased them. And the money brokers use the funds derived from the cigarette importers to continue the laundering cycle.

The Complaint alleges that RJR directed and controlled this money-laundering scheme, utilizing other companies to handle and sell their products. It alleges that RJR gave special handling instructions "intended to conceal the true purchaser of the cigarettes." Complaint ¶ 58. The Complaint also alleges that RJR's executives and employees would travel from the United States to Europe, the Caribbean, and Central America in order to further these money-laundering arrangements; that they shipped cigarettes through Panama in order to use Panama's secrecy laws to shield the transactions from government scrutiny; that RJR's employees would take monthly trips from the United States to Colombia through Venezuela, bribe border guards in order to enter Colombia illegally, receive payments for cigarettes, travel back to Venezuela, and wire the funds to RJR's accounts in the United States; that RJR employees traveled extensively from the United States to Europe and South America to supervise the money-laundering scheme and to entertain the criminal customers; that RJR communicated internally and with its coconspirators by means of U.S. interstate and international mail and wires; that RJR's employees filed large volumes of fraudulent documents with the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms to further their scheme; that RJR received the profits of its money-laundering schemes in the United States; and

that RJR acquired Brown & Williamson Tobacco "for the purpose of expanding upon their illegal cigarette sales and money-laundering activities," *id.* ¶¶ 100-103.

The Complaint asserts that in the course of executing this scheme RJR committed various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, money laundering, violations of the Travel Act, 18 U.S.C. § 1952, and providing material support to foreign terrorist organizations. In addition the Complaint asserts that RJR committed New York common law torts of fraud, public nuisance, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received.

Defendants moved to dismiss both the RICO and state law claims. In its first decision, the district court dismissed the RICO claims on the ground that RICO has no application to activity outside the territory of the United States and cannot apply to a foreign enterprise. *European Cmty. v. RJR Nabisco, Inc. (European Cmty. I)*, No. 02-CV-5771, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *4-5, *7 (E.D.N.Y. Mar. 8, 2011). The court concluded, citing *Morrison*, that the "focus" of the RICO statute is the enterprise, *see* 18 U.S.C. §§ 1961(4), 1962(a)-(c), and that the enterprise alleged in the Complaint, which consisted largely of a loose association of Colombian and Russian drug-dealing organizations and European money brokers whose activity was directed outside the United States, could not be considered domestic. Because the enterprise was foreign, the district court concluded, under *Morrison*'s presumption that United States statutes do not apply extraterritorially absent a clear indication of

congressional intent, that the Complaint failed to state an actionable violation of RICO. The court thus dismissed the RICO claims under Federal Rule of Civil Procedure 12(b)(6).

As for the state law claims alleged to come within the federal courts' diversity jurisdiction, the district court observed that the necessary *complete* diversity might be destroyed if the European Community remained a plaintiff. *European Cmty. I*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *8. The court allowed Plaintiffs' counsel time to determine whether the European Community intended to remain a party to the suit. *Id.*

Once advised that the European Community would remain a party, the court ruled that the state law claims did not come within the diversity jurisdiction of the federal courts. It held that the European Community was not a "foreign state," as used in 28 U.S.C. § 1332, with the consequence that the European Community's continued participation in the suit together with various foreign nation plaintiffs destroyed complete diversity and deprived the court of jurisdiction. *European Cmty. v. RJR Nabisco, Inc. (European Cmty. II)*, 814 F. Supp. 2d 189, 208 (E.D.N.Y. 2011). The court declined to exercise supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(c) because it had dismissed all the federal law claims. *Id.*

DISCUSSION

Plaintiffs contend on appeal that the district court erred in concluding that the Complaint failed to allege federal law claims, and that the district court erred in finding absence of diversity jurisdiction for the state law claims. We agree with both contentions.

I. RICO Claims

We turn first to the dismissal of the RICO claims. We review a district court's dismissal under Rule 12(b)(6) *de novo*. *Connecticut v. Duncan*, 612 F.3d 107, 112 (2d Cir. 2010).

A. The Extraterritoriality of RICO

The district court concluded that the Complaint failed to state actionable RICO claims because the alleged enterprise was located and directed outside the United States. The court's analysis was based on the Supreme Court's ruling in *Morrison* that the presumption against extraterritorial application of U.S. statutes bars such application absent a clear manifestation of congressional intent. *European Cmty. I*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *4. The district court concluded that RICO is silent as to whether Congress intended it to apply to conduct outside the United States, and that "this silence prohibits any extraterritorial application of RICO." *Id.* The district court believed this conclusion was compelled by our holding in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29, 32 (2d Cir. 2010). We disagree in several respects with the district court's analysis, including its understanding of the *Norex* precedent.

The RICO statute incorporates by reference numerous specifically identified federal criminal statutes, as well as a number of generically described state criminal offenses (known in RICO jurisprudence as "predicates"). 18 U.S.C. § 1961(1). It adds new criminal and civil consequences to the predicate offenses in certain circumstances — generally speaking, when those offenses are committed in a pattern (consisting of two or more

instances) in the context of "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962; *see also id.* § 1964.

Litigants, including Plaintiffs in this case, have argued that this just-quoted provision of the statute, which makes RICO applicable to enterprises whose activities affect foreign commerce, sufficiently indicates congressional intent that RICO should apply extraterritorially. In *Norex* we rejected that argument, noting the Supreme Court's admonishment in *Morrison* that the mere fact of a statute's generic reference to "interstate or foreign commerce," identifying the source of Congress's authority to regulate, would not qualify as a manifestation of congressional intent that the statute apply extraterritorially. *Norex*, 631 F.3d at 33 (internal quotation mark omitted). The argument we rejected in *Norex* was to the effect that all claims under RICO may apply to foreign conduct because all RICO claims require proof of an enterprise whose activities affect interstate or foreign commerce. *Id.* We viewed this argument as plainly foreclosed by *Morrison*.

We rejected also a similarly ambitious argument to the effect that Congress's adoption of some RICO predicate statutes with extraterritorial reach indicated a congressional intent that RICO have extraterritorial reach for all its predicates. *See id.* In so holding, we refused to equate the extraterritoriality of certain RICO predicates with the extraterritoriality of RICO as a whole. *See id.* ("*Morrison* similarly forecloses Norex's argument that because a number of RICO's predicate acts possess an

extraterritorial reach, RICO itself possesses an extraterritorial reach.").

The district court here construed our rejection in *Norex* of arguments that RICO applies extraterritorially *in all of its applications* as a ruling that RICO can never have extraterritorial reach in *any* of its applications. *See European Cmty. I*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *4. This was a misreading of *Norex*. We now confront an argument about the extraterritorial reach of RICO that was not considered in Norex, or in other rulings called to our attention. Congress manifested an unmistakable intent that certain of the federal statutes adopted as predicates for RICO liability apply to extraterritorial conduct. This appeal requires us to consider whether and how RICO may apply extraterritorially in the context of claims predicated on such statutes.

We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not *overcome* *Morrison*'s presumption against extraterritoriality, RICO will not apply extraterritorially either.

Our conclusion is compelled primarily by the text of RICO. Section 1961(1), which defines "racketeering activity" for purposes of RICO, incorporates by

reference various federal criminal statutes, which serve as predicates for RICO liability. Some of these statutes unambiguously and necessarily involve extraterritorial conduct. They can apply only to conduct outside the United States. As examples, § 2332 of Title 18 criminalizes killing, and attempting to kill, "a national of the United States, *while such national is outside the United States.*" 18 U.S.C. § 2332(a) (emphasis added). Section 2423(c) criminalizes "[e]ngaging in illicit sexual conduct *in foreign places.*" *Id.* § 2423(c) (emphasis added). As the conduct which violates these two statutes can occur only outside the United States, Congress unmistakably intended that they apply extraterritorially. By explicitly incorporating these statutes by reference as RICO predicate offenses, Congress also unmistakably intended RICO to apply extraterritorially when § 2332 or § 2423(c) form the basis for RICO liability. Indeed, it is hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could *never* have extraterritorial application.

Other statutes that serve as RICO predicates clearly state that they apply to both domestic and extraterritorial conduct. For example, § 1203(b), which criminalizes hostage taking, explicitly applies to conduct that "occurred outside the United States" if the offender or the hostage is a U.S. national, the offender is found in the United States, or the conduct sought to coerce the government of the United States; sections 351(i) and 1751(k) expressly provide "extraterritorial jurisdiction" for their criminalization of assassination, kidnapping, or assault of various U.S. government officials; a provision of § 1512 criminalizes extraterritorial tampering with

witnesses, victims, or informants; and § 2332b(e) expressly asserts "extraterritorial Federal jurisdiction" as to its criminalization of various "conduct transcending national boundaries" [3] including attempts, threats, or conspiracies to kill persons within the United States or damage property within the United States. Here too, Congress has not only incorporated into RICO statutes that overcome the presumption against extraterritoriality, it has also provided detailed instructions for when certain extraterritorial conduct should be actionable.

By incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability. Thus, a RICO complaint predicating the defendants' liability on their having engaged in a pattern of attempting, while "outside the United States," to kill the plaintiff, "a national of the United States," as prohibited by 18 U.S.C. § 2332(b), would state an actionable violation of RICO notwithstanding the extraterritorial conduct because RICO incorporates Congress's express statement that § 2332(b) applies to whomever "*outside the United States* attempts to kill . . . a national of the United States." *Id.* (emphasis added). When, and to the extent that, a RICO charge is based on an incorporated predicate that manifests Congress's clear intention to apply extraterritorially,

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[3] "[C]onduct transcending national boundaries" is defined as "conduct occurring outside of the United States in addition to the conduct occurring in the United States." 18 U.S.C. § 2332b(g)(1).

the presumption against extraterritorial application of U.S. statutes is overcome. The district court was mistaken in interpreting our *Norex* decision as holding that RICO can never apply extraterritorially.

Applying its perception of our holding in *Norex*, the district court approached the question whether a RICO claim can apply to extraterritorial conduct by determining that the "focus" of RICO is the criminal enterprise and that any application of RICO is therefore impermissibly extraterritorial when the alleged enterprise is foreign. Because the district court viewed the enterprise alleged in the Complaint as consisting primarily of a loose association of foreign criminal organizations whose policies and activities were directed from outside the United States, it concluded that the enterprise was foreign. It accordingly held that the presumption against extraterritorial application of U.S. statutes barred application of RICO to the facts alleged in the Complaint. In our view, the court erred in that analysis for two principal reasons.

First, the district court's approach necessarily disregards the textual distinctions in the statutes incorporated by reference as RICO predicates. For example, the money laundering statute explicitly applies to extraterritorial conduct "if (1) the conduct is by a United States citizen . . . and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f). The district court's reading of RICO would preclude extraterritorial applications of RICO where they are explicitly permitted under the money laundering statute. By contrast, some RICO predicates do not mention any extraterritorial application, *see, e.g.*, 18 U.S.C. § 1511

(criminalizing the obstruction of state or local law enforcement), while others clearly apply to extraterritorial conduct, but under different circumstances than the money laundering statute, *see, e.g.*, *id.* § 1203(b) (criminalizing a subset of extraterritorial hostage-taking). The district court would presumably have RICO apply extraterritorially in the same manner when claims are brought under these different predicates, effectively erasing carefully crafted congressional distinctions.

Nothing in RICO requires or even suggests such an erasure of statutory distinctions. Rather, RICO prohibits, roughly speaking, investing in, acquiring control of, working for, or associating with an "enterprise" if the defendant's conduct involves (in a variety of potential fashions) a "pattern of racketeering activity." 18 U.S.C. §§ 1962(c), 1964(c). RICO does not qualify the geographic scope of the enterprise. [4] Nor does RICO contain any other language that would suggest its extraterritorial application differs from that specified in its various predicates.[5] Without any congressional instruction to

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[4] RICO does, however, limit its application to conduct associated with enterprises "engaged in, or the activities of which affect interstate or foreign commerce." 18 U.S.C. § 1962.

[5] We recognize, however, that unlike the other substantive provisions of *RICO*, § 1962(a) "focuses . . . on conduct different from the conduct constituting the pattern of racketeering activity." *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 321 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 1636 (2012). Accordingly, we have held that a private plaintiff seeking damages under § 1964(c) arising from a violation of § 1962(a) must allege an "injury from the defendants' investment of racketeering income in an enterprise," rather than relying on the violation of one of the predicate acts alone. *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990). Whether the investment constituting a

the contrary, we see no reason to adopt a construction of RICO that would permit a defendant associated with a foreign enterprise to escape liability for conduct that indisputably violates a RICO predicate, but that could impose liability on a defendant associated with a domestic enterprise for extraterritorial conduct that does not fall within the geographic scope of the relevant predicate.

Second, the district court's requirement that the defendant be, loosely speaking, associated with a domestic enterprise in order to sustain RICO liability seems to us illogical. Under that standard, if an enterprise formed in another nation sent emissaries to the United States to engage in domestic murders, kidnappings, and violations of the various RICO predicate statutes, its participants would be immune from RICO liability merely because the crimes committed in the United States were done in conjunction with a foreign enterprise. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States. *Cf. United States v. Parness*, 503 F.2d 430, 438-39 (2d Cir. 1974) (noting that a conclusion that RICO requires both a domestic enterprise and a domestic pattern of racketeering activity would "permit those whose actions ravage the American economy to escape

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violation of § 1962(a) must be domestic is without consequence here, because Plaintiffs have pled a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations. *See* Second Am. Compl. ¶¶ 100-03, 163.

prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise").

The district court's standard has the additional, undesirable effect of complicating the question of what conduct exposes a party to liability in the United States. Under the substantive criminal law, conduct may be sufficiently extraterritorial to provide a party with peace of mind that it is not subject to U.S. law.

Under the district court's reasoning, however, if the party acts in concert with a "domestic enterprise," it may nevertheless face stiff penalties under RICO. An important value of the presumption against extraterritoriality is predictability. An interpretation of RICO that depends on the location of the enterprise would undermine, rather than promote, that value.

We think it far more reasonable to make the extraterritorial application of RICO coextensive with the extraterritorial application of the relevant predicate statutes. This interpretation at once recognizes that "RICO is silent as to any extraterritorial application" and thus has no extraterritorial application independent of its predicate statutes. *See Norex*, 631 F.3d at 33 (quoting *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)). At the same time, it gives full effect to the unmistakable instructions Congress provided in the various statutes incorporated by reference into RICO. This approach has the benefit of simplifying the question of what conduct is actionable in the United States and permitting courts to consistently analyze that question regardless of whether they are presented with a RICO claim or a

claim under the relevant predicate. It also avoids incongruous results, such as insulating purely domestic conduct from liability simply because the defendant has acted in concert with a foreign enterprise.[6]

B. The Conduct Alleged in the Complaint

The Complaint in our case alleges a pattern of racketeering activity based on predicates that include (1) money laundering, 18 U.S.C. §§ 1956-57, (2) providing material support to foreign terrorist organizations, 18 U.S.C. § 2339B, (3) mail fraud, 18 U.S.C. § 1341, (4) wire fraud, 18 U.S.C. § 1343, and (5) violations of the Travel Act, 18 U.S.C. § 1952. Applying *Morrison*'s presumption against extraterritoriality to these predicate statutes, we conclude first that the money laundering and material support of terrorism statutes both apply extraterritorially under specified circumstances, including those circumstances alleged in the Complaint. Second, we conclude that the wire fraud and money fraud statutes, as well as the Travel Act, do not overcome *Morrison*'s presumption against extraterritoriality. Nevertheless, because Plaintiffs have alleged that all elements of the wire fraud, money fraud, and Travel Act violations were completed in the United States or while crossing U.S. borders, we conclude that the Complaint states

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[6] Our rejection of the district court's conclusion — that RICO has an exclusive focus on the location of the enterprise, which alone determines whether a particular application is impermissibly extraterritorial — accords with the Ninth Circuit's ruling in *United States v. Chao Fan Xu*, 706 F.3d 965, 977 (9th Cir. 2013), although on different reasoning.

domestic RICO claims based on violations of those predicates.

1. Allegations of Money Laundering and Material Support of Terrorism

The money laundering predicates apply extraterritorially "if (1) the conduct is by a United States citizen . . . and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000." 18 U.S.C. § 1956(f). Section 1956(f) expressly states that "[t]here is extraterritorial jurisdiction over the conduct prohibited by this section." Section 1957 similarly criminalizes knowingly engaging "in a monetary transaction in criminally derived property of a value greater than $10,000 . . . derived from specified unlawful activity," *id.* § 1957(a), if the offense "*takes place outside the United States* . . . , but the defendant is a United States person," [7] *id.* § 1957(d) (emphasis added). The predicate act criminalizing material support for terrorism similarly states that it applies extraterritorially. It covers "knowingly provid[ing] material support or resources to a foreign terrorist organization," *id.* § 2339B(a)(1),

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[7] In defining the offense of money laundering, § 1956 also states that money laundering includes transporting "a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States." 18 U.S.C. § 1956(a)(2). This however is irrelevant to our inquiry. The quoted passage necessarily involves crossing the United States border. Regulation of conduct in crossing the United States borders is not regulation of extraterritorial conduct. The presumption against extraterritorial application of United States statutes does not apply to statutes that regulate entering and exiting the United States.

and adds that "[t]here is extraterritorial Federal jurisdiction over an offense under this section," *id.* § 2339B(d)(2).

The claims of the Complaint asserting RICO liability for a pattern of violations of these predicates meet the statutory requirements for extraterritorial application of RICO. The district court erred in dismissing, as impermissibly extraterritorial, the RICO claims based on these predicates.[8]

2. Allegations of Mail Fraud, Wire Fraud, and Travel Act Violations

Whether Congress manifested an intent that the wire fraud statute, 18 U.S.C. § 1343,[9] or the Travel Act, 18 U.S.C. § 1952, [10] applies extraterritorially

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[8] It might be argued that Congress's clear statement in the predicate statute that *it* applies extraterritorially does not constitute a congressional statement that a RICO charge predicated on that statute applies extraterritorially. This overlooks the fact that the predicate statutes are incorporated by reference into the RICO statute and are a part of it.

[9] The wire fraud statute, 18 U.S.C. § 1343, provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned . . . .

[10] The Travel Act, 18 U.S.C. § 1952, provides, in pertinent part, as follows:

> (a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

presents a more complicated question. The argument in favor of extraterritoriality depends on their references to foreign commerce. The wire fraud statute applies to the transmission of communications by "wire, radio, or television . . . in interstate or foreign commerce" in the execution of a scheme to defraud. *Id.* § 1343. The Travel Act applies to "travel[] in interstate or foreign commerce or use[] [of] the mail or any facility in interstate or foreign commerce" with intent to further unlawful activity. *Id.* § 1952(a). In *Morrison*, the Supreme Court observed that a "general reference to foreign commerce . . . does not defeat the presumption against extraterritoriality." *Morrison*, 130 S. Ct. at 2882. This admonition appears to bar reading these statutes literally to cover wholly foreign travel or communication. We conclude that the references to foreign commerce in these statutes, deriving from the Commerce Clause's specification of Congress's

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(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform—

(A) an act described in paragraph (1) or (3) . . . or

(B) an act described in paragraph (2) . . . shall be fined . . . , imprisoned . . . , or both.

(b) "As used in this section (i) A unlawful activity" means . . . any act . . . indictable under . . . section 1956 or 1957 [the money-laundering statute].

authority to regulate, do not indicate a congressional intent that the statutes apply extraterritorially.[11]

The mail fraud statute presents an easier case.[12] There, unlike in the Travel Act and wire fraud statute, Congress included no reference to transnational application whatsoever. *See generally* 18 U.S.C. § 1341. Accordingly, we see no basis for finding a manifestation of congressional intent that the mail fraud statute apply extraterritorially.

Applying these principles to the Complaint, we conclude that it alleges sufficient domestic conduct for the claims involving mail fraud, wire fraud, and

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[11] In *Pasquantino v. United States*, 544 U.S. 349, 371-72, (2005), the Supreme Court suggested, in dictum, that, because "the wire fraud statute punishes frauds executed in interstate or foreign commerce" it "is surely not a statute in which Congress had only domestic concerns in mind." *Id.* (internal citations and quotation marks omitted). Because that statement is dictum, and because *Morrison* explicitly rejects the reasoning on which it relies, we do not read *Pasquantino* to require us to construe the "foreign commerce" language of the wire fraud statute as rebutting the presumption against extraterritoriality.

[12] The mail fraud statute, 18 U.S.C. § 1341, provides that:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned . . . .

Travel Act violations to sustain the application of RICO, notwithstanding that these predicates do not apply extraterritorially.[13]

The Complaint alleges that RJR essentially orchestrated a global money laundering scheme from the United States by sending employees and communications abroad. It claims that RJR "communicated . . . with [its] coconspirators on virtually a daily basis by means of U.S. interstate and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question." Complaint ¶ 94. The Complaint also states that RJR and its coconspirators "utilized the interstate and international mail and wires, and other means of communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities within the United States, the European Community, and the Member States." *Id.* ¶ 95. The Complaint alleges that "the U.S. mails and wires are used by [RJR] to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to [RJR] and [its] subsidiaries, and to maintain an accounting of the proceeds received by [RJR] from the sale of the cigarettes, with said proceeds ultimately being

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[13] As noted above, the allegations based on the money-laundering predicate and the predicate covering material support for terrorist activities state an actionable claim notwithstanding their non-domestic elements, because Congress manifested its intention that those predicates apply extraterritorially as RICO violations.

returned to [RJR] in the United States." *Id.* ¶ *96.* The Complaint furthermore alleges:

> [T]he employees, executives, and managers of [RJR] often traveled extensively, both to supervise the schemes and also to entertain [RJR's] criminal customers. RJR executives traveled from the United States to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers. RJR executives and managers who engaged in such travel and entertainment often received large travel and entertainment budgets from [RJR].

Id. ¶ 84.

Beyond these allegations that the Defendants managed their global money laundering schemes from the United States through foreign travel and communications, the Complaint also claims that the schemes themselves were directed at the United States and had substantial domestic effects. The Complaint alleges that RJR repatriated the profits of its unlawful activity into the United States through money laundering and other acts of concealment. The money laundering involved in one portion of the scheme — that comprising Russian organized crime and the Bank of New York — was largely centered in and operated from Queens, New York, where tens of millions of dollars were allegedly laundered. Defendants allegedly filed large volumes of false documents with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms in order to deceive these agencies and permit the unlawful activity to continue. Finally, the Complaint alleges that the money laundering scheme it

describes is intertwined with organized crime and narcotics trafficking in New York City, that much of the money laundering through cigarette sales occurs in New York City, and that millions of dollars' worth of real estate have been purchased within New York in conjunction with the scheme.

We need not now decide precisely how to draw the line between domestic and extraterritorial applications of the wire fraud statute, mail fraud statute, and Travel Act, because wherever that line should be drawn, the conduct alleged here clearly states a domestic cause of action. The complaint alleges that defendants hatched schemes to defraud in the United States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so. Defendants are also alleged to have traveled from and to the United States in furtherance of their schemes. In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims. If domestic conduct satisfies every essential element to prove a violation of a United States statute that does not apply extraterritorially, that statute is violated even if some further conduct contributing to the violation occurred outside the United States.[14]

We note that, as we are reviewing a dismissal based solely on the contents of the Complaint, our conclusion is based entirely on the Complaint, which we find sufficient to state an actionable claim. Plaintiffs' ability to prevail will depend, in part, on

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[14] We need not decide whether domestic conduct satisfying fewer than all of the statute's essential elements could constitute a violation of such a statute.

their ability to present evidence showing that the alleged statutory violation was domestic. Should the pattern of conduct of certain Defendants or certain schemes prove to be extraterritorial, the district court may need to narrow the scope of this action accordingly, through either motions for (partial) summary judgment or through carefully tailored jury instructions.

II. Diversity Jurisdiction and State Law Claims

Next, we turn to the district court's dismissal of Plaintiffs' state law claims. We review a district court's legal conclusions dismissing state law claims for lack of subject matter jurisdiction de novo. *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 293 (2d Cir. 2009).

Federal courts are powerless to adjudicate a suit unless they have subject matter jurisdiction over the action. The district court determined that it lacked subject matter jurisdiction over Plaintiffs' state law claims under the diversity jurisdiction statute, 28 U.S.C. § 1332. Section 1332 requires complete diversity between opposing parties. *See, e.g.*, *Hallingby v. Hallingby*, 574 F.3d 51, 56 (2d Cir. 2009); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267, 2 L. Ed. 435 (1806). If the European Community is not diverse from RJR, its continued participation in this lawsuit would destroy complete diversity and deprive the federal court of jurisdiction.[15]

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[15] Since this lawsuit was filed, the European Community has been incorporated into the European Union. Despite this change, the European Community remains the relevant entity, as the court's subject matter jurisdiction and a party's instrumentality status for purposes of § 1603 are both determined at the time when the complaint is filed. *See*

Section 1332(a)(4) grants the federal courts jurisdiction over suits where the amount in controversy exceeds $75,000 and the suit is between "a foreign state . . . as plaintiff and citizens of a State." 28 U.S.C. § 1332(a)(4). A "foreign state" is defined for purposes of § 1332(a)(4) by § 1603, which is part of the Foreign Sovereign Immunities Act ("FSIA"). This latter section provides:

> (a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof . . .
>
> and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Id. § 1603.

The European Community is therefore a "foreign state" for purposes of § 1332(a)(4) if it is an "agency or instrumentality of a foreign state." Whether it is an agency or instrumentality of a foreign state, in turn, depends on whether it conforms to the definition in subsection (b). There is no doubt that

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Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989) (subject matter jurisdiction); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003) (instrumentality status).

the European Community satisfies the first and third elements of the definition of "agency or instrumentality" provided in § 1603(b).[16] It is clear also that the European Community is not a political subdivision of a foreign state. The question is whether the European Community is "an organ of a foreign state." *Id.*

For the reasons discussed below, we conclude that the European Community is an organ of a foreign state, and thus an agency or instrumentality of a foreign state. As a result, the continued participation of the European Community in this suit does not destroy complete diversity.

A. Definitions

The FSIA does not include a definition of the term "organ." A number of dictionaries we have consulted include definitions of "organ" that are altogether compatible with the European Community in its relationship to the states that formed it. *See* Organ Definition, Oxford English Dictionary, http://www.oed.com/view/Entry/132421 (last visited July 10, 2013) ("A means of action or operation, an instrument; (now) esp. a person, body of people, or thing by which some purpose is carried out or some function is performed."); American Heritage

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[16] The European Community has independent legal status. Consolidated Version of the Treaty Establishing the European Community, art. 281, Oct. 11, 1997, O.J. (C340) 293 (1997) [hereinafter EC Treaty] ("The Community shall have legal personality."). The European Community was not created under the laws of a non-member state. *See* EC Treaty, art. 313; *see also In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 938 (7th Cir. 1996) ("The FSIA requires that the [entity] not be created under the laws of a third country, that is, a nation not a member of the multinational joint venture.").

Dictionary 875 (2d College ed. 1982) ("An organization that performs certain specified functions: The FBI is an organ of the Justice Department."); Merriam-Webster's Third New International Dictionary of the English Language 1589 (1976) ("an instrumentality exercising some function or accomplishing some end"). RJR in rebuttal points to definitions that characterize an organ as subordinate to a larger entity, arguing that this is not the case with the European Community's relationship to its member nations. But the fact that the word is sometimes used to refer to a smaller part of a larger whole does not mean that the word can serve only in that fashion. The European Community was formed by its member nations to serve on their collective behalf as a body exercising governmental functions over their collective territories. We see no reason why it is not properly described as an organ of each nation.

In *Filler v. Hanvit Bank*, 378 F.3d 213, 217 (2d Cir. 2004), this court set forth five factors to guide a court in determining whether a party is an "organ" under the FSIA. The factors are:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

Id. (quoting *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 846-47 (5th Cir. 2000)) (alteration in original). We have stated that these factors invite a

balancing process, and that an entity can be an organ even if not all of the factors are satisfied. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 85 (2d Cir. 2008), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010). The European Community satisfies four of these factors and, very likely, also the fifth: it was created by the European nations for national purposes; it is supervised by the foreign countries; it has public employees whose salaries are paid, at least indirectly, by the member nations, which continue to bear collectively the expenses of operation; it holds exclusive rights in the foreign countries; and the foreign countries treat it as a government entity under their laws. We discuss each of these factors briefly below.

1. National Purpose

It seems beyond doubt that the member states that founded the European Community did so for a "national purpose." *Filler*, 378 F.3d at 217. Their purpose was to establish governmental control on a collective basis over various national functions previously performed by each of the member states on an individual basis, such as by establishing a common market and a monetary union, and by coordinating economic activities throughout the community. EC Treaty, arts. 1-4. The management of a common currency and the maintenance of economic stability are quintessential national purposes.

2. Supervision

We have said that a foreign state actively supervises an organ when it appoints the organ's key officials and regulates some of the activities the

organ can undertake. *See, e.g., Peninsula Asset Mgmt. (Cayman) Ltd. v. Hankook Tire Co.*, 476 F.3d 140, 143 (2d Cir. 2007). Member states exercise supervisory responsibility over the European Community by appointing representatives to serve on the Council of Ministers, which is the European Community's "primary policy-making and legislative body." *See* Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 Cardozo L. Rev. 1045, 1046 (2000). Each member of the Council is the appointed representative of one member state (although the individual representative will change depending on the subject matter to be discussed by the Council). *Id.* Additionally, each member state selects commissioners to serve on the European Commission, which administers the Community's various departments. *Id.* at 1046-47.

It is true that these entities are just two of the five basic institutions of the European Community. However, this factor does not require the foreign state to micro-manage every aspect of the organ's activities. The Council of Ministers is the European Community's primary policy-making and legislative body. Therefore, the member states' supervision of this entity enables the member states to supervise the most significant policy decisions made by the European Community.

3. Public Employees

The third factor asks "whether the foreign state requires the hiring of public employees and pays their salaries." *Filler*, 378 F.3d at 217. The EC Treaty, enacted by the member states, requires the creation of particular positions, which are to be filled by public officials. *See European Cmty. II*, 814 F.

Supp. 2d at 205. Service as a European Community official satisfies the European Court of Justice's definition of "public service" because such officials exercise "powers conferred by public law and duties designed to safeguard the general interests of the state or of other public authorities." *Id.* (quoting Case 149/79, *Comm'n of the European Cmtys. v. Kingdom of Belgium*, 1980 E.C.R. 3881, ¶10). The member states indirectly pay the salaries of the public employees. In 2000, for example, they contributed 78.4% of the European Community's budget, 5.5% of which goes to administrative expenses, which include salaries and pensions. See European Commission, EU Budget 2008 Financial Report, 82, 88 (2009).

RJR argues that the European Community does not satisfy this factor because its employees are not public employees *of the member states*. *See, e.g.*, *Patrickson v. Dole Food Co.*, 251 F.3d 795, 808 (9th Cir. 2001), *aff'd by* 538 U.S. 468 (2003). This fact seems to us of small importance at best. Given that the European Community exercises governmental functions delegated to it by the member states, and does so through public employees whose pay is financed largely by the member states, it seems to make little or no difference for the question whether the European Community serves as an organ of its member states that its employees are not employees directly of the member states. Nevertheless, as noted above, our precedent makes clear that the five *Filler* factors are merely issues to be considered in the decision, and there is no requirement that all five be satisfied to support the conclusion that an entity is an organ of a foreign state. We would reach the same conclusion even if precedent compelled us to decide

that the European Community fails to satisfy this factor. *See Peninsula Asset Mgmt.*, 476 F.3d at 143 (concluding the entity was an "organ" despite the fact that it failed to satisfy the public employee factor).

4. Exclusive Rights

Fourth, we consider "whether the entity holds exclusive rights to some right in the foreign country." *Filler*, 378 F.3d at 217 (alteration omitted). This factor has been given a broad meaning. *See, e.g.*, *Terrorist Attacks*, 538 F.3d at 86 (an entity satisfied this factor when it held "the 'sole authority' to collect and distribute charity to Bosnia"); *Peninsula Asset Mgmt.*, 476 F.3d at 143 (entity "has the exclusive right to receive monthly business reports from the solvent financial institutions it oversees"). The European Community holds the exclusive right to exercise a number of significant governmental powers, which include the right to "authori[z]e the issue of banknotes within the Community" and "to conclude the Multilateral Agreements on Trade in Goods." *European Cmty.*, 814 F. Supp. 2d at 206-07.

5. Foreign State Law

Finally, the fifth factor asks "how the entity is treated under foreign state law." *Filler*, 378 F.3d at 217. In *Peninsula Asset Management*, this factor was satisfied when the "Korean government informed the State Department and the district court that it treats [the entity] as a government entity." *Peninsula Asset Mgmt.*, 476 F.3d at 143. Neither party cites to European law that clearly addresses this question. The member states that are parties to this suit have identified the European Community as an organ. Plaintiffs informed the district court in their briefing that they consider the European Community to be a

governmental entity, and the United States Department of State has advised that it accepts this representation. *See* Brief for the United States as Amicus Curiae at 29. Therefore, in a manner similar to the one employed in *Peninsula Asset Management*, the European Community appears to satisfy this factor. Furthermore, the fact that the member states have ceded portions of their governmental authority to the European Community to be exercised by it in their stead and on their collective behalf seems to confirm its status as an organ and agency of the member states.

RJR argues that none of the member states has treated the European Community as its "organ," rather than as a supranational body of the member states. This argument, however, depends on the proposition that a governmental entity created by a collectivity of governments to exercise certain powers in their stead and on their behalf cannot be at once a supranational entity and an organ or agency of the actors that created it. It appears to us that both descriptions are accurate, and the fact that the European Community functions as a supranational governmental entity does not negate its also being an organ and agency of its member states, which continue to exist as sovereign nations, notwithstanding having delegated some of their governmental powers to the supranational agency they created.

B. Multi-National Entities

RJR argues that the text and legislative history of the FSIA, along with the common law at the time of the FSIA's enactment, demonstrate that an "organ" of

a foreign state cannot include an international organization created by multiple states. We disagree.

First, we turn to the text of § 1603. The fact that § 1603(b)(2) uses the term "organ of a foreign state" in the singular does not necessarily negate application to the European Community, which serves numerous foreign states. 28 U.S.C. § 1603(b)(2) (emphasis added). There is no logic to the proposition that an entity that serves as an organ of one foreign state cannot also serve as the organ of another. The Dictionary Act furthermore states that "[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. § 1. Context "means the text of the Act of Congress surrounding the word at issue, or the texts of other related congressional Acts." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 199 (1993). The context here gives no indication that the phrase "a foreign state" must be interpreted to exclude an organ that serves as an agency of several states. Our interpretation finds support in the law of other circuits dealing with the pooling of shares to determine the status of commercial entities. *See In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 938-39 (7th Cir. 1996) (holding that an entity created by multiple governments is an "agency or instrumentality" under the FSIA); *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994) (same); *Linton v. Airbus Indus.*, 30 F.3d 592, 598 n.29 (5th Cir. 1994) (collecting cases). In these "share pooling" cases, courts have repeatedly held that corporations owned by several foreign states are covered by the FSIA, even though the statute uses the singular.

RJR argues that because some dictionaries define "organ" as a smaller unit of a larger entity, an "organ" cannot be a larger international organization created by multiple foreign states. *See* Merriam-Webster's Collegiate Dictionary 819 (10th ed. 1997) (giving as a definition of "organ": "a subordinate group or organization that performs specialized functions"). This argument is not persuasive for at least three reasons: First, while some dictionary definitions treat an organ as smaller than, or subordinate to, the entity for which it functions as an organ, other dictionary definitions do not include any specification that the entity serving as an organ must be smaller or subordinate, but focus rather on the organ's performance of a service. See definitions provided *supra*. Second, even if we accept an implicit connotation of subordinate status, that is not necessarily inconsistent with treating the European Community as an organ of the nations that created it. While the member states ceded to the European Community primacy as to certain specified governmental functions, they retained the vast majority of governmental control. Each member state continued to exist as a sovereign state, notwithstanding having voluntarily ceded portions of its authority to the European Community, and, through the Treaty of Lisbon, the member states dissolved the European Community and incorporated it into the European Union. Thus, in certain senses, the European Community exercised its powers by the sufferance of the member states, and was both subordinate to and smaller than the aggregate of the nation states that created it. Third, it is not as if the European Community's access to the federal courts under § 1332 turns exclusively on the meaning of

"organ." The definition of the types of entities eligible to claim diversity jurisdiction as a plaintiff under the "foreign state" rubric of 28 U.S.C. § 1332(a)(4) is considerably more complex and multifaceted. As noted, a "foreign state" includes "an agency or instrumentality of a foreign state," *id.* § 1603(a), which in turn is defined to mean, in relevant part, "any entity which is a separate legal person . . . and which is an organ of a foreign state." *Id.* § 1603(b). The type of entity that qualifies for federal jurisdiction thus partakes not only of "organ" but also of "agency," "instrumentality," and "separate legal person[hood]." While the ultimate question is whether the European Community qualifies as an "organ," the meaning of "organ" under this statute is influenced by the definitional chain, which requires a construction that differs from what "organ" would ordinarily mean by itself. Cf. *Babbitt v. Sweet Home Chapter of Comms. for a Great Or.*, 515 U.S. 687, 704-05 (1995) (construing the word "harm" in light of the meaning of the word it defined). To qualify as an "agency or instrumentality," for example, the "organ" must be a "separate legal person," which requirement by itself takes "organ" out of certain conventional meanings of the term.

RJR advances a number of additional strained arguments to the effect that an international organization should not be considered an agency or instrumentality, none of which are convincing.[17]

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[17] RJR also cites, in support of its position, the enactment of separate statutes, 22 U.S.C. §§ 288-288*l*, which provide certain immunities to certain international organizations, but which do not grant co-extensive immunities to all international organizations as the FSIA provides to foreign states. RJR

* * *

We are satisfied that the European Community meets at least four, and possibly all five of the Filler factors, and therefore qualifies as an organ and agency of a foreign state under § 1332(a)(4). The suit accordingly comes within the diversity jurisdiction, as specified in 28 U.S.C. § 1332.[18]

CONCLUSION

The judgment of the district court dismissing the action is VACATED, and the case REMANDED for further proceedings.

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argues that this separate statutory framework for analyzing the immunities of international organizations suggests that Congress did not contemplate that such organizations would fall within the definition of "foreign state" under the FSIA. It suffices to say that Congress's belief that certain international organizations were not organs of foreign states under the FSIA cannot be read to imply that Congress believed none could be organs of foreign states. Nothing in the statutes cited by RJR suggests that international organizations that do qualify as organs of a foreign state cannot, by virtue of their status as international organizations, be treated as foreign states under the FSIA.

[18] Plaintiffs also contend that the district court erred by dismissing their federal common law nuisance claim without discussion. Although the Complaint does not specify whether Plaintiffs' public nuisance claim was brought under federal or state law, it appears that Plaintiffs stipulated that all of their common law claims were to be decided under New York law. Therefore, we have considered the dismissal of Plaintiffs' public nuisance claim along with Plaintiffs' other state law claims.

APPENDIX B

European Cmty. v. RJR Nabisco, Inc.

United States District Court
for the Eastern District of New York

March 7, 2011, Decided;

March 8, 2011, Filed

02-CV-5771 (NGG) (VVP)

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, United States District Judge.

The European Community and twenty-six European countries (the "Member States"), captioned above (collectively, "Plaintiffs"), bring this action against various corporate entities of American cigarette manufacturer R.J. Reynolds (collectively, "Defendants") for five violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962, and for nine common-law torts in relation to Defendants' sales practices respecting their cigarettes. (2d Am. Compl. (Docket Entry # 73).) Defendants move to dismiss Plaintiffs' Second Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Defs.' Mot. (Docket Entry # 83).) As set forth below, the court grants Defendants' motion to dismiss in part and reserves decision on the remainder of Defendants' motion

pending a response from Plaintiffs' counsel as to whether the European Community will proceed in this action.

I. BACKGROUND

A. Procedural History

Defendants' motion is the latest chapter in what is now a decade of litigation between the parties. On November 3, 2000, the European Community filed a complaint against all of the current Defendants, and others, generally alleging that Defendants engaged in a practice of smuggling and money laundering in relation to their cigarettes, in violation of RICO. (Compl., *European Community v. RJR Nabisco, Inc.*, No. 00-cv-6617 (NGG) (VVP) (E.D.N.Y. Nov. 3, 2000) (Docket Entry # 110).) On July 16, 2001, the court dismissed the European Community's RICO claims and then dismissed the remainder of the action for lack of subject matter jurisdiction. *European Community v. RJR Nabisco, Inc.* (*EC I*), 150 F. Supp. 2d 456, 500-502 (E.D.N.Y. 2001).

On August 6, 2001, the European Community filed another complaint in this court, adding ten European countries as plaintiffs, [1] against substantially the same defendants. (Compl., *European Community v. RJR Nabisco, Inc.*, No. 01-cv-5188 (NGG) (VVP) (Aug. 6, 2001) (Docket Entry # 1).) On the defendants' motion to dismiss, the court again dismissed the plaintiffs' complaint. *European Community v. Japan*

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[1] Those countries included the Kingdom of Belgium, the Republic of Finland, the French Republic, the Hellenic Republic, the Federal Republic of Germany, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Portuguese Republic, and the Kingdom of Spain, all members of the European Community.

Tobacco, Inc. (*EC II*), 186 F. Supp. 2d 231, 233 (E.D.N.Y. 2002).

Plaintiffs took a two-pronged approach to that decision: they filed yet another complaint—the Original Complaint in this action (Compl. (Docket Entry # 1))—and appealed the court's decision in *EC II* to the United States Court of Appeals for the Second Circuit (Pls.' Notice of Appeal, *European Community v. RJR Nabisco, Inc.*, No. 01-cv-5188 (NGG) (VVP) (E.D.N.Y. Mar. 25, 2002) (Docket Entry # 84)). On appeal, the Second Circuit affirmed this court's decision in *EC II* against all of the defendants except Japan Tobacco, Inc., and its subsidiaries and affiliates. *European Community v. RJR Nabisco, Inc.* (*EC III*), 355 F.3d 123, 127 (2d Cir. 2004).[2]

Following *EC III*, the parties stipulated to Plaintiffs filing an amended complaint in the instant action while the court stayed the proceedings so Plaintiffs could petition for a writ of certiorari to the Supreme Court of the United States. (*See* Docket Entry ## 41, 47.) On May 2, 2005, the Supreme Court granted certiorari and summarily vacated and remanded *EC III* in light of the Court's ruling in *Pasquantino v. United States*, 544 U.S. 349 (2005), decided the same term. *European Community v. RJR Nabisco, Inc.*, 544 U.S. 1012, 1012 (2005). On remand, the Second Circuit concluded that *Pasquantino* did not change its analysis in *EC III*, and reinstated its decision. *European Community v.*

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[2] The Second Circuit vacated this court's decision in *EC II* with respect to Japan Tobacco, Inc. because, at the time of this court's decision in *EC II*, "Japan Tobacco had not yet been served in the action and had not appeared or joined the motion to dismiss." *EC III*, 355 F.3d at 139.

RJR Nabisco, Inc. (*EC IV*), 424 F.3d 175, 182-83 (2d Cir. 2005). Plaintiffs again petitioned the Supreme Court for a writ of certiorari, but the Court denied the petition on January 9, 2006. *European Community v. RJR Nabisco, Inc.*, 546 U.S. 1092 (2006).

From 2006 to 2007, Plaintiffs engaged in settlement discussions with Japan Tobacco. (*See* Mem. & Order (Docket Entry # 72) at 2.) No parties had any contact with the court until March 2009, when Plaintiffs moved to file a Second Amended Complaint—their fifth in nine years—to add new defendants, new European nation-plaintiffs, and new factual allegations that had apparently developed since their last filing. (*See id.*) The court granted Plaintiffs' motion, and Plaintiffs filed their Second Amended Complaint. (2d Am. Compl.) On April 30, 2010, Defendants filed their fully briefed motion to dismiss the Second Amended Complaint. (Defs.' Mot. (Docket Entry # 83); Defs.' Mem. (Docket Entry # 84); Pls.' Opp'n (Docket Entry # 87); Defs.' Reply (Docket Entry # 88).)

Since Defendants have filed their motion, the Supreme Court decided *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which prohibits the extraterritorial application of federal statutes that are silent on or unclear concerning extraterritoriality. Applying Morrison, the Second Circuit concluded that RICO is silent on extraterritorial application. *Norex Petroleum Ltd. v. Access Indus., Inc.* (*Norex II*), 622 F.3d 148, 2010 WL 3749281, at *2 (2d Cir. 2010), *amended by* 2010 WL 4968961 (2d Cir. 2010). The court then ordered the parties to address the application of *Morrison* and *Norex II* to Plaintiffs' RICO claims at oral argument.

(Docket Entry, Oct. 21, 2010.) After hearing oral argument from the parties, the court ordered supplemental briefing on the issue. (Docket Entry, Oct. 26, 2010; *see also* Defs.' Suppl. Mem. (Docket Entry # 95); Pls.' Suppl. Opp'n (Docket Entry # 97); Defs.' Suppl. Reply (Docket Entry # 99).) The court now considers Defendants' motion and the parties' supplemental briefs.

B. Plaintiffs' Second Amended Complaint

Plaintiffs' Second Amended Complaint—a structureless morass of allegations, devoid of any sequential description of events—generally asserts that Defendants engaged in a global money-laundering scheme. (2d Am. Compl. ¶¶ 1-5.) Plaintiffs allege a representative scheme as follows: First, Colombian and Russian criminal organizations smuggle cocaine and heroin, respectively, into Europe, where they generate large cash proceeds, in Euros, from drug sales. (*Id.* ¶¶ 31-32.) Those criminal organizations then trade those Euros, located in Europe, for local currency in the criminal organizations' home countries, through a European black market "money broker." (*Id.* ¶¶ 37-38.) Next, illicit cigarette importers purchase those Euros from the money broker at a discount to the prevailing exchange rate. (*Id.* ¶ 39.) Those importers then use the Euros to purchase Defendants' cigarettes from U.S. and European wholesalers. (*Id.*) The wholesalers then purchase cigarettes from Defendants, and ship the cigarettes to the importers. (*Id.*)

As for *Defendants'* involvement in this scheme—beyond their selling of cigarettes to U.S. and European wholesalers—Plaintiffs allege that

Defendants "utilized certain companies" to handle the illicit transactions, who "maintained lists of 'direct customers of RJR' which included special handling instructions for shipments for [customers that] Defendants knew were involved in criminal activities." (*Id.* ¶ 58.) Plaintiffs further allege that Defendants traveled around the world "for the purpose of meeting and negotiating business agreements with individuals who [Defendants] knew, or should have known, were involved in the laundering of narcotics proceeds." (*Id.* ¶ 63; *see also Id.* ¶¶ 84, 115.)

Plaintiffs also allege some variations on this representative scheme. In some instances, the illicit cigarette importers are the same Colombian and Russian criminal organizations engaged in drug trafficking. (*Id.* ¶ 39.) In others, the money brokers themselves purchase cigarettes from wholesalers. (*Id.* ¶ 59.) In another, Defendants initially ship their cigarettes into Panama to "use the secrecy laws of the Republic of Panama" to shield the transactions. (*Id.* ¶¶ 66, 104-108.) Plaintiffs also allege that Defendants purchased former British tobacco manufacturer, Brown & Williamson, for the purpose of expanding these schemes in Europe. (*Id.* ¶¶ 100-103.)

In one scheme, Defendants' employees allegedly traveled to Venezuela, snuck across the border to Colombia, sold cigarettes to Colombian criminal organizations for cash, snuck back across the Venezuelan border, and wired the cash proceeds to Defendants from Venezuela. (*Id.* ¶ 72.) Sometimes these employees would receive payments in Brady

Bonds,[3] rather than cash, which they would sell for U.S. dollars back in Venezuela. (*Id.* ¶ 74.)

In another scheme—completely devoid of any connection to Europe—a non-party corporation with the same address as one of the Defendants sold cigarettes in Iraq, via territories controlled by the Kurdistan Workers' Party, a designated terrorist organization. (*Id.* ¶¶ 77, 80.) Plaintiffs argue that this somehow harmed the European Community's interests. (*Id.*)

Lastly, Plaintiffs assert that, "[o]n many occasions over the past decade," Defendants lied to them regarding the exportation of their cigarettes. (*Id.* ¶¶ 85-87.) First, Plaintiffs allege that Defendants lied to them about markings on their cigarettes that supposedly enabled Defendants to identify illicit cigarette purchasers. (*Id.* ¶ 86.) And second, Plaintiffs complain that Defendants undervalued the cost of their cigarettes when importing them into Europe. (*Id.* ¶¶ 87-89.)

Plaintiffs finish their Second Amended Complaint by listing seven "interests" the United States and this district have in Defendants' alleged conduct (*id.* ¶¶ 133(a)-(g)); thirty-six "injuries" suffered by Plaintiffs (*Id.* ¶¶ 146(a)-(jj)); twenty-nine requests for relief (*id.* ¶¶ 153(a)-(o); 155(a)-(n)); and fourteen legal claims against Defendants (*Id.* ¶¶ 157-257).

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[3] Brady Bonds are tradeable securities issued by the United States and "backed by United States Treasury zero coupon bonds, which act as collateral or as a guarantee and give investors greater security." Comment, Jessica W. Miller, *Solving the Latin America Sovereign Debt Crisis*, 22 U. Pa. J. Int'l Econ. L. 677, 687 (2001)

II. DISCUSSION

A. Extraterritoriality of Plaintiffs' RICO Claims

Defendants argue that, following *Morrison* and *Norex* II, Plaintiffs' RICO claims are impermissibly extraterritorial, and must be dismissed under Federal Rule of Civil Procedure 12(b)(6). (Defs.' Suppl. Mem. at 1-9.) Rule 12(b)(6) allows for dismissal of a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In evaluating a motion to dismiss under Rule 12(b)(6), a court must "accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the non-moving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104, 115 (2d Cir. 2008) (citation omitted). If the claim at issue does not state a "legally cognizable right of action," the court must dismiss that claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). As discussed below, the court agrees that Plaintiffs' claims are impermissibly extraterritorial and must be dismissed under Rule 12(b)(6).

1. Extraterritoriality of RICO

In measuring the territorial reach of a federal statute, *Morrison* commands that "when a statute gives no clear indication of an extraterritorial application, it has none." 130 S. Ct. at 2878. In *Norex II*, Second Circuit concluded that its prior precedent "holds that RICO is silent as to any extraterritorial application." 2010 WL 4968691, at *3 (citing *N. S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)). Therefore, in light of *Morrison*,

this silence prohibits any extraterritorial application of RICO. *Id.* at *3.

2. The Focus of RICO

In determining whether a claim seeks an extraterritorial application of a federal statute, the court must look to the "focus" of that statute. *See Morrison*, 130 S. Ct. at 2883-84. This focus is not necessarily the "bad act," or the *actus reus*, prohibited by the statute. *Id.* at 2881. Rather, it is "the object[] of the statute's solicitude," the activities "the statute seeks to regulate [and] parties or prospective parties to those [activities] that the statute seeks protect." *Id.* (internal citations and quotation marks omitted).

In *Morrison*, for example, the Court engaged in a thorough analysis of § 10(b) of the Securities Exchange Act to determine its "focus." *Id.* at 2884. Section 10(b) makes it illegal for "any person . . . to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance." *See id.* at 2881 (quoting 15 U.S.C. § 78j(b)). Looking at the operative section of the statute, the Supreme Court noted that § 10(b) focused "not upon the place where the deception originated, but upon purchases and sales of securities." *Id.* The Court concluded that "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to regulate; it is parties or prospective parties to those transactions that the statute seeks protect." *Id.* (internal citations and quotation marks omitted). Accordingly, the Court determined that § 10(b) was limited in scope "to purchases and sales of securities

in the United States." *Id.* (emphasis added). Because the sales of securities at issue in *Morrison* occurred outside the United States, the Court rejected the plaintiffs' argument that it merely sought enforcement of a domestic claim even though the deceptive conduct occurred in Florida. *Id.* at 2885-85.

While the Second Circuit has not addressed the "focus" of RICO, the statutory analysis in *Morrison* proves illuminating. The RICO statute contains four operative subsections. Subsection (a) makes it "unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . to use or invest . . . any part of such income [in] any enterprise." 18 U.S.C. § 1962(a). Subsection (b) prohibits "any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise." *Id.* 1962(b). Subsection (c) forbids "any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). Lastly, subsection (d) outlaws conspiring "to violate any of the provisions of subsection (a), (b), or (c) of this section." *Id.* § 1962(d).

Each of the three primary subsections—(a), (b), and (c)—contains three elements: the "person," the "enterprise," and the "pattern of racketeering activity." *See St. Germain v. Howard*, 556 F.3d 261, 263 (5th Cir. 2009) ("Claims under RICO, 18 U.S.C. § 1962, have three common elements: (1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise.") (citation omitted). With respect to these elements, the statute

does not punish the predicate acts of racketeering activity—indeed, each predicate act is, itself, a separate crime—but only racketeering activity in connection with an "enterprise." *See United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("The central role of the concept of enterprise under RICO cannot be overstated."); Randy D. Gordon, *Crimes That Count Twice: A Reexamination of RICO's Nexus Requirements Under 18 U.S.C. §§ 1962(c) and 1964(c)*, 32 Vt. L. Rev. 171, 172 (2007) ("[E]ven a pervasive pattern of racketeering acts (also referred to as 'predicate' acts in cases and commentary) will not sustain a RICO claim if it is not tied to a RICO 'enterprise.'"); *cf. Morrison*, 130 S. Ct. at 2884 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" (quoting 15 U.S.C. § 78j(b))). RICO, therefore, seeks to regulate "enterprises" by protecting them from being victimized by or conducted through racketeering activity. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001) (concluding that the purpose of RICO is "both protect[ing] a legitimate 'enterprise' from those who would use unlawful acts to victimize it [and] protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful activity is committed'" (citing *United States v. Turkette*, 452 U.S. 576, 591 (1981) and *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994))). Even the name of the statute suggests that it places its focus on the "enterprise"—RICO is, after all, the Racketeer Influenced and Corrupt *Organizations* Act.

See 18 U.S.C. § 1961, Short Title (emphasis added). Accordingly, it is the "enterprise" that is the object of the statute's solicitude, and the "focus" of the statute. *See Morrison*, 130 S. Ct. at 2884.

3. Location of a RICO Enterprise

Because the "focus" of RICO is the "enterprise," a RICO "enterprise" must be a "domestic enterprise." *Cf. id.* at 2884 ("And it is in our view only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which § 10(b) applies."). While there are no cases suggesting how a court may determine the geographic location of a RICO enterprise, other cases have analogously discussed how to determine the geographic location of a corporation. In *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), for example, the Supreme Court adopted the "nerve center test" as the vehicle of choice in determining a corporation's "principal place of business." In *Hertz*, the Supreme Court interpreted the diversity jurisdiction statute to "conclude that [a corporation's] 'principal place of business' is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is the place that Courts of Appeals have called the corporation's 'nerve center.'" 130 S. Ct. at 1192 (citing *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862, 865 (S.D.N.Y. 1959)).

The nerve center test "identif[ies] the place where overall corporate policy originates or the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objectives." *Royal Indem.*

Co. v. Wyckoff Heights Hosp., 953 F. Supp. 460, 462-63 (E.D.N.Y. 1996) (internal punctuation and citations omitted) (citing *Scot Typewriter*, 170 F. Supp. at 865). In instances where the corporation at issue may not have a single center of corporate policy, *Hertz* consoles the lower courts that "there will be hard cases," such as when enterprises "may divide their command and coordinating functions among officers who work at several different locations." 130 S. Ct. at 1194. Even then, the Court encourages using the nerve center test, as it "points courts in a single direction. . . [where they] do not have to try to weigh corporate functions, assets, or revenues different in kind, one from the other." *Id.* Relative to other tests that attempt to define corporate location, the nerve center test "provides a sensible test that is relatively easier to apply, not a test that will, in all instances, automatically generate a result." *Id.*

RICO enterprises, however, may not have a single center of corporate policy. Although the "nerve center test" compels the court to determine a principal, i.e., single place of business for a corporation, though there may be many, the test is still instructive in determining the geographic location of "enterprise." The nerve center test's focus on the "brains," that is, where the corporation's decision are made, as opposed to the "brawn," that is, how the corporation acts, shows the Supreme Court's conception of the corporation's geographic location and where it makes its decisions as twinned. Thus, although an enterprise may very well possess several "nerve centers," it is the "brains" not the "brawn" that dictate where the enterprise is located.

Indeed, the divide-and-command coordination structure mentioned in *Hertz* is the same type of

organization contemplated by the Court in *Boyle* in regard to RICO enterprises. There, the court admitted that a RICO enterprise

> need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times.

Boyle v. United States, 129 S. Ct. 2237, 2245 (2009). Nonetheless, a RICO enterprise must have some semblance of "interpersonal relationships and a common interest," *id.* at 2244, and must "must function as a continuing unit," *id.* at 2245. Applying the nerve center test here, to determine an "enterprise's" location, similarly avoids the "weigh[ing of] corporate functions, assets, or revenues different in kind, one from the other." *Hertz*, 130 S. Ct. at 1194. An analysis of the territoriality of an "enterprise" in a RICO complaint, therefore, should focus on the decisions effectuating the relationships and common interest of its members, and how those decisions are made.

4. Territoriality of Plaintiffs' RICO Claims

The enterprise alleged in Plaintiffs' Complaint comprises of Defendants, "associated distributers, shippers, currency dealers, wholesalers, money brokers, and other participants." (2d Am. Compl. ¶ 158.) Plaintiffs assert that Defendants participated in the management of the enterprise through a pattern of racketeering activity, (*Id.* ¶ 171), and conspired with the other entities involved in the enterprise to violate RICO (*Id.* ¶¶ 174-80). The

Member States allege that they were harmed as a result of this conduct. (*Id.* ¶¶ 164-65; 169, 173, 180.)

Plaintiffs' accusations concerning the operation of the enterprise can be characterized as encompassing a series of steps governed by "interpersonal relationships." *See Boyle*, 129 S. Ct. at 2245. As discussed above, those steps are the "drug smuggling step" performed by the Colombian and Russian mob (2d Am. Compl. ¶¶ 31-32); the "currency swap step" between those mob organizations and European money brokers (*Id.* ¶¶ 37-38); the "currency purchase step" between the money brokers and cigarette importers (*id.* ¶ 39); the "cigarette purchase step" performed by importers and wholesalers (*id.*); and the "cigarette shipping step" performed by wholesalers and Defendants (*id.*).

Nothing in Plaintiffs' Complaint even remotely suggests that Defendants had any hand in the planning, decisions, or "overall corporate policy" of the drug smuggling, currency swap, or currency purchase steps. In fact, the Complaint very clearly and repeatedly articulates that the "overall corporate policy" regarding these steps originates with organized criminal organizations in Europe and South America. (*E.g.*, *id.* ¶¶ 32 (alleging that drugs are sold into Europe via the orders of criminal organizations in Europe and the Middle East); 37 (claiming that European money brokers have "developed methods to bypass the banking systems"); 38-41 (describing South American criminal organizations as "negotiating" contracts with money brokers and "contacting" individuals in Europe).)

Regarding the cigarette purchase and cigarette shipping step, Plaintiffs allege that Defendants

"utilized certain companies to handle and sell their products [that Defendants] knew were involved in criminal activities," (*id.* ¶ 58), and that Defendants "negotiate[ed] business agreements with individuals who [Defendants] knew, or should have known, were involved in the laundering of narcotics proceeds" (*id.* ¶ 63). Yet Plaintiffs do not allege how Defendants' involvement in these activities demonstrated how Defendants organized, orchestrated, planned, or even participated in the remaining criminal steps. Indeed, the Complaint, when read as a whole, strongly suggests the money laundering cycle was directed by South American and European criminal organizations. It is those organizations that began the money laundering process by smuggling drugs; those organizations that swapped currency with money brokers in Europe; and those organizations that controlled the cigarette importers, and thereby completed the money laundering cycle. Defendants' appear to be nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs. If there was an "overall corporate policy" of the money laundering enterprise alleged in the Complaint, it issued from those criminal organizations located in South America and Russia—not Defendants in the United States. Because Plaintiffs RICO claims, Counts I through V, are extraterritorial, they do not state a "legally cognizable right of action," and the court must dismiss them under Federal Rule of Civil Procedure 12(b)(6). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 (2007).

B. Subject Matter Jurisdiction over Plaintiffs' Remaining Common Law Claims

Aside from their RICO claims, Plaintiffs only remaining claims are predicated on state-law causes of action. As such, the court must assess whether it has subject matter jurisdiction, particularly diversity jurisdiction, over the remainder of this case. *See Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001). To do so would require the court to address whether the European Community may bring claims on diversity grounds. If the European Community were not present, however, the court would undoubtedly possess subject matter jurisdiction over the remaining state law claims because the Member States are "foreign states" as contemplated by the diversity statute. *See* 28 U.S.C. § 1332(a)(4).

This very issue was raised at oral argument on October 26, 2010. (Oral Arg. Tr. (Docket Entry # 91) at 8-9.) There, the court expressed its concern about ruling on an issue of such solemnity unless it was absolutely necessary. (*Id.* at 12.) Both sides conceded that the potential jurisdictional defect could be circumvented if the European Community voluntarily withdrew from the action. (*Id.* at 9, 15.) Plaintiffs' counsel stated that he would be amenable to withdrawing the European Community from suit, if the court dismissed Plaintiffs' RICO claims, after consulting with his clients. (*Id.* at 15, 56.) Accordingly, the court reserves decision on Defendants' motion regarding the state-law causes of action to allow Plaintiffs' counsel time to inform the court whether the European Community intends to remain in this suit.

III. CONCLUSION

Defendants' Motion to Dismiss is GRANTED in part. The court directs Plaintiffs' counsel to inform the court within thirty days of this Memorandum and Order as to whether Plaintiff European Community intends to remain in this suit. The court reserves decision on the remainder of Defendants' motion pending Plaintiffs' counsel's response.

SO ORDERED.

/s/ Nicholas Garaufis,

NICHOLAS G. GARAUFIS
United States District Judge

Dated: Brooklyn, New York
March 7, 2011

APPENDIX C

European Cmty. v. RJR Nabisco, Inc.

United States Court of Appeals for the Second Circuit

May 7, 2014, Petition for Rehearing Submitted;

August 20, 2014, Petition for Rehearing Decided

Docket No. 11-2475-cv

Before: LEVAL, SACK, and HALL, Circuit Judges.

PER CURIAM:

In their petition for panel and *en banc* rehearing, the defendants—appellees (collectively, "RJR") contend, among other things, that the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 *et seq.*, requires private plaintiffs to allege a domestic injury, and that this requirement offers an independent basis upon which to dismiss the complaints in this action to the extent that they fail to allege such injuries. We conclude that RICO imposes no such requirement. The petition for panel rehearing is therefore denied.

DISCUSSION

The RICO statute allows "[a]ny person injured in his business or property by reason of a violation of [18 U.S.C. §] 1962" to sue for and recover treble damages and attorneys' fees. 18 U.S.C. § 1964(c). RJR argues that, regardless of whether the conduct giving rise to this injury may be extraterritorial, the

injury itself must be domestic. *See* Pet. for Reh'g 2, 12. We are not persuaded.

RJR urges us to infer from a paragraph added on rehearing to this Court's decision in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (*per curiam*), a holding that § 1964(c), which forms the basis for the plaintiffs' claim here, requires allegation of a domestic injury. But that added language did no more than confirm that *Norex* dealt only with private causes of action, and that we had no occasion to decide whether RICO could reach extraterritorial conduct "when enforced by the government pursuant to Sections 1962, 1963 or 1964(a) and (b)." *Id.* at 33. Nowhere in *Norex* did we consider or decide whether § 1964(c) requires a domestic injury. We see no reason to construe RICO to include such a requirement.

To establish a compensable injury under § 1964(c), a private plaintiff must show that (1) the defendant "engage[d] in a pattern of racketeering activity in a manner forbidden by" § 1962, and (2) that these "racketeering activities" were the proximate cause of some injury to the plaintiff's business or property. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985); *Holmes v. Secs.* Investor Prot. Corp., 503 U.S. 258, 268 (1992).

The Supreme Court has stated unequivocally that "the compensable injury" addressed by § 1964(c) "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern." *Sedima*, 473 U.S. at 497; *accord Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 457 (2006). "If the defendant engages in a pattern of racketeering activity in a manner forbidden by [§ 1962(a)-(c)], and the

racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c)." *Sedima*, 473 U.S. at 495. Although we have distinguished *Sedima* when deciding that a plaintiff pursuing a cause of action for a violation of § 1962(a) must plead an "injury from the defendants' investment of racketeering income in an enterprise," *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990), the Supreme Court's conclusion that RICO's remedial provisions are addressed to violations of RICO predicates still stands when applied to §§ 1962(b), (c) and conspiracies to commit violations of those sections charged under § 1962(d).[1]

The *Sedima* court's conclusion that § 1964(c)'s injury requirement focuses on RICO's predicates dovetails with the extraterritoriality analysis set forth in the panel opinion in this case. Just as "the extraterritorial application of RICO [is] coextensive with the extraterritorial application of the relevant predicate statutes," Am. Slip Op. at 16:18-19, we look to the relevant predicate statute to determine whether the injury caused by a violation thereof must be domestic. If an injury abroad was proximately caused by the violation of a statute which Congress

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[1] Simultaneously with the filing of this opinion, we have amended the original panel opinion in this case to reflect the fact that the plaintiffs have pled a domestic investment with respect to their claims under § 1962(a). As discussed in the panel opinion, the plaintiffs have also alleged that RJR engaged in conduct in the United States satisfying every essential element of each RICO predicate statute that does not apply extraterritorially. Under the circumstances, we see no reason why the plaintiffs should further be required to plead that the injury they suffered from the alleged domestic investment occurred in the United States.

intended should apply to injurious conduct performed abroad, we see no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute. This conclusion is consistent both with "Congress' self-consciously expansive language and overall approach," as well as "its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'" *Sedima*, 473 U.S. at 498 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970)). The presumption against extraterritoriality, which is primarily concerned with the question of what *conduct* falls within a statute's purview, does not require a different result. *See, e.g.*, *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 254 (2010) (referring to the question of a statute's extraterritorial application as a question of "what conduct [the statute] reaches").

On the facts of this case, we conclude that the plaintiffs are not required to plead that their alleged injuries actually occurred in the United States.

The petition for panel rehearing is therefore DENIED.

APPENDIX D

EUROPEAN CMTY. V. RJR NABISCO. INC.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APRIL 13, 2015, DECIDED
11-2475

PRESENT: ROBERT A. KATZMANN
Chief Judge,
DENNIS JACOBS
JOSÉ A. CABRANES,
ROSEMARY S. POOLER,
REENA RAGGI,
RICHARD C. WESLEY,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
GERARD E. LYNCH,
DENNY CHIN,
RAYMOND J. LOHIER, JR.,
SUSAN L. CARNEY,
CHRISTOPHER F. DRONEY,
Circuit Judges.

ORDER

Following disposition of this appeal, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby **DENIED**.

Peter W. Hall, *Circuit Judge*, concurs by opinion in the denial of rehearing *en banc*.

Dennis Jacobs, *Circuit Judge*, joined by José A. Cabranes, Reena Raggi, Debra Ann Livingston, and Gerard E. Lynch, dissents by opinion from the denial of rehearing *en banc*.

José A. Cabranes, *Circuit Judge*, joined by Dennis Jacobs, Reena Raggi, and Debra Ann Livingston, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Reena Raggi, *Circuit Judge*, joined by Dennis Jacobs, José A. Cabranes, and Debra Ann Livingston, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

Gerard E. Lynch, *Circuit Judge*, dissents by opinion from the denial of rehearing *en banc*.

HALL, *Circuit Judge*:

This petition for rehearing in banc challenges the conclusion of the panel, consisting of senior judges Leval and Sack, and me, that the Racketeer Influenced Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, applies to foreign conduct when liability is based on "racketeering acts" consisting of violations of predicate statutes which Congress expressly made applicable to foreign conduct. *See European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014). As Judges Leval and

Sack, being senior judges, have no vote on whether to grant rehearing in banc, I write independently in support of denial of the petition.

In considering the petition for panel rehearing, our panel reexamined our initial view, as well as its compatibility with *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010), and with our court's ruling in *Norex Petroleum Ltd. v. Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010), and reaffirmed the soundness of our conclusion.

RICO applies when the evidence shows a pattern of "racketeering activity." 18 U.S.C. §§ 1962, 1964. "Racketeering activity" is defined as "any act . . . indictable under" specified criminal statutes. *Id.* § 1961(1). The criminal statutes specified are colloquially referred to as RICO "predicates." As the panel opinion noted, some of the specified predicate statutes expressly provide that extraterritorial conduct is indictable. *See RJR Nabisco*, 764 F.3d at 136.

Many of the predicates that apply to foreign conduct relate to international terrorism. A few weeks after the terrorist attacks of September 11, 2001, Congress passed the USA PATRIOT Act of 2001 (the "Patriot Act"), an anti-terrorism measure, which, among other provisions, amended RICO by adding to its list of predicates nearly 20 antiterrorism statutes that expressly apply to foreign conduct. Pub. L. No. 107-56, § 813, 115 Stat. 272, 382. The Patriot Act did this by adding those statutes to RICO's definition of "racketeering activity" specified in § 1961(1) as a basis of RICO liability.[1] 18 U.S.C.

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[1] Prior to the Patriot Act, only a few RICO provisions specified extraterritorial application.

§ 1961(1). The House Report for the Patriot Act states, "[t]he RICO provisions in the bill . . . . enhance the civil and criminal consequences of certain crimes that have been deemed RICO predicates by Congress and provide better investigative and prosecutorial tools to identify and prove crimes." H.R. Rep. No. 107-236, at 70 (2001). Since 2001, Congress has added additional explicitly extraterritorial crimes to RICO, for a total of nearly 30 predicate racketeering acts that expressly apply to foreign conduct, nearly all of them relating to international terrorism directed against United States interests. *See, e.g.*, 18 U.S.C. §§ 2332g (conduct involving anti-aircraft missile systems); 2339D (terrorist military training). Some of RICO's predicate statutes indeed apply only to conduct outside the United States. *See, e.g.*, 18 U.S.C. § 2332 (killing, and attempting to kill, "a national of the United States, while such national is outside the United States" (emphasis added)); 18 U.S.C. § 2423(c) (engaging in illicit sexual conduct in foreign places by a U.S. citizen or permanent resident).

The panel opinion concluded that "[b]y incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." *RJR Nabisco*, 764 F.3d at 137. That conclusion was sound. The RICO statute explicitly states that acts "indictable under" the specified statutes constitute "racketeering activity," to which RICO liability attaches, and many of these predicate statutes expressly provide that foreign conduct is indictable.

This interpretation of RICO is wholly consistent with *Morrison*. In *Morrison*, the Supreme Court explained that there is a presumption against construing United States statutes as applying extraterritorially but that the presumption is overcome when the statute clearly manifests a congressional intent that it apply extraterritorially. *See Morrison*, 561 U.S. at 265. Courts are not to justify extraterritorial application by speculating that Congress would have wanted that had it focused on the question. On the other hand, when Congress, acting within its powers, has explicitly provided for extraterritorial application of a statute, as it has done by incorporating statutes that apply extraterritorially into RICO as predicates, the statute must be interpreted as Congress has directed. The purpose of *Morrison* was to bar courts from attributing to Congress an intent that its statutes apply extraterritorially in the absence of a clear expression thereof; it was not to prevent courts from giving effect to Congress's clearly manifested intentions that certain statutes apply extraterritorially.

Finally, the panel's holding on this point is consistent with *Norex*. The panel disagreed with the district court's interpretation of *Norex* as concluding that RICO could never have extraterritorial application. To the question of whether RICO, in any of its applications, has extraterritorial reach, the *Norex* opinion devotes two sentences, each of which could have two meanings. The first sentence, derived from our court's prior opinion in *North South Finance Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996), states that "the RICO statute is silent as to any extraterritorial application." The second states that

Morrison "forecloses [the Norex plaintiff's] argument that because a number of RICO's predicates possess an extraterritorial reach, RICO itself possesses an extraterritorial reach." *Norex*, 631 F.3d at 33.[2]

The first of these sentences, noting RICO's silence on extraterritorial application, could mean that the RICO statute does not suggest that it might broadly apply *in all of its provisions* to extraterritorial conduct. Alternatively, the words of the sentence could also mean that RICO is "silent" as to whether any of its component provisions can ever apply to extraterritorial conduct. The first interpretation seems far more probable. First, if the statement carries the former meaning, it is indisputably correct. The RICO statute is indeed silent as to general extraterritorial application. There are no words in the statute which suggest, or even discuss, the possibility that foreign conduct might be considered violative of RICO, without regard to whether the particular predicate invoked applies to foreign conduct. On the other hand, if given the second meaning, the statement would be either flatly incorrect, or at least misleading. As explained above,

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[2] Judge Raggi twice quotes *Norex* as saying, because "'RICO is silent as to any extraterritorial application,' . . . therefore, 'it has none.'" *See* Raggi Dissent at 1; *see also id.* at 8. This will mislead the reader, although doubtless unintentionally. It is true that the words "it has none" appear in the *Norex* decision. But in uttering those words, *Norex* was not speaking about the RICO statute. It was simply quoting *Morrison*'s framework for deciding whether a statute has extraterritorial application. *Morrison* stated (and *Norex* quoted), "[W]hen a statute gives no clear indication of an extraterritorial application, *it has none*." *Norex*, 631 F.3d at 32 (emphasis added). *Norex* never said that RICO has no extraterritorial application.

RICO incorporates by reference the terms of other statutes. The Act explicitly states that racketeering activity, which serves as a basis of RICO liability, includes any act "indictable under" the incorporated predicate statutes, a number of which expressly provide that foreign conduct is indictable. Whatever ultimate conclusion one might draw, RICO certainly cannot be fairly described as "silent" on the question whether any predicate acts of racketeering can consist of foreign conduct. Furthermore, the sentence about silence, if construed to mean that RICO contains no indication whether any of its predicate acts of racketeering can include foreign conduct, would seem contradicted by the second sentence on the issue, which recognizes that "a number of RICO's predicates possess an extraterritorial reach." *Norex*, 631 F.3d at 33.

The second sentence, if taken out of context, could have either of two meanings:

(1) In view of *Morrison*, we reject the plaintiff's argument that, by providing for extraterritorial application of *some* of RICO's predicates, Congress manifested a clear intention that RICO have extraterritorial application in *all* of its provisions.

(2) Notwithstanding Congress's express provision that "racketeering activity" include some clearly specified foreign conduct, *Morrison* requires that racketeering activity be construed as excluding all foreign conduct.

The first interpretation is clear, logical, and entirely consistent with *Morrison*. Under *Morrison*, the presumption against extraterritorial applicability requires that statutes be understood not to apply

extraterritorially absent a clear provision for extraterritorial application.[3]

The fact that Congress made clear provision in the terms of RICO that *some* of its predicates apply extraterritorially does not manifest a clear congressional intent that its other provisions also apply extraterritorially. With respect to extraterritorial application of these other provisions, RICO would flunk the *Morrison* test. This is so clear a consequence of *Morrison*'s rule that one short sentence is entirely sufficient to state the point. It requires no further explanation.

On the other hand, if the *Norex* panel had in mind version (2) when it said that "*Morrison* . . . forecloses [the plaintiff's] argument," one would wonder why the panel came to that conclusion. *Id.* Where Congress expressly provided that acts "indictable" under statutes listed in RICO are "racketeering acts," which justify RICO liability, and Congress included

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[3] Judge Raggi suggests that *Morrison*'s discussion of Section 30(b) of the Exchange Act supports her view that RICO can never have extraterritorial application. *See* Raggi Dissent at 8-10. In fact, this portion of Morrison's discussion supports the panel's interpretation of RICO. In *Morrison*, the parties argued that, because one small provision of the Exchange Act could potentially apply extraterritorially, the entire Act should be read as applying extraterritorially. *See Morrison*, 561 U.S. at 263-65. The *Morrison* court rejected this argument, holding that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U.S. at 265 (emphasis added). In *RJR Nabisco*, our panel followed precisely this line of reasoning, holding that where Congress has prescribed extraterritorial application for certain of RICO's predicates, it applies extraterritorially "only to [that] extent." 764 F.3d at 136.

in that list statutes that expressly provide for extraterritorial application (indeed some that apply *only* to foreign conduct), Congress did exactly what *Morrison* requires for extraterritorial application. It manifested a clear intention that RICO apply extraterritorially—to that limited extent. If the *Norex* opinion meant that, notwithstanding this clear manifestation of congressional intent, *Morrison* requires that RICO be interpreted as never applying to foreign conduct, one would wonder why the *Norex* panel reached that conclusion and how it could be justified. The assertion would cry out for further explanation, if indeed any adequate explanation could be found. Notwithstanding the facial ambiguity of the sentence, the brevity of the *Norex* panel's treatment of the subject strongly suggests that it meant to convey the simple, noncontroversial proposition expressed in version (1) above, and not the puzzling proposition expressed in version (2).

In short, recognizing the potential ambiguity in *Norex*'s brief discussion of this point, by far the sounder interpretation of that ruling is that RICO's clear manifestation of intent that *some* of its provisions apply to foreign conduct permits extraterritorial application of RICO in those situations, but does not justify interpreting every provision of RICO as being extraterritorial. The panel's ruling in this case was in full agreement with that proposition.

Some colleagues are troubled by the prospect of applying RICO to extraterritorial conduct, which they deem unwise. Whether this is wise or unwise is not the court's business when Congress has legislated clearly on the issue. Congress provided in the RICO

statute that acts "indictable under" a list of predicate acts are racketeering acts. That ends our inquiry.

I therefore concur with the court's decision to deny rehearing in banc.

DENNIS JACOBS, Circuit Judge, joined by JOSÉ A. CABRANES, REENA RAGGI, DEBRA ANN LIVINGSTON, and GERARD E. LYNCH, Circuit Judges, dissenting from the denial of rehearing *in banc*:

I respectfully dissent from denial of rehearing *in banc*. The panel opinion in this appeal is in taut tension with our earlier opinion in *Norex Petroleum Ltd. v. Access Industries. Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam). The resulting instability will likely require *in banc* review to reconcile these precedents, or to jettison one of them.

Both cases address the extraterritorial application of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* They reach dissonant conclusions as to: (1) whether RICO may apply extraterritorially, *compare Norex*, 631 F.3d at 31, *with European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 136 (2d Cir. 2014); (2) whether Supreme Court precedent "forecloses [the] argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach," *Norex*, 631 F.3d at 33; *compare id.*, *with RJR Nabisco*, 764 F.3d at 136; and (3) the very definition of an extraterritorial application of RICO, namely whether extraterritoriality turns on the foreign locus of the *enterprise* or the foreign locus of the *predicate acts*, *compare Norex* 631 F.3d at 31, 33, *with RJR Nabisco*, 764 F.3d at 136, 142.

The frequency of RICO litigation in this Circuit all but ensures that district courts will face vexing questions about this. Litigation on the fault lines of *Norex* and *RJR Nabisco* is likely to present "a controlling question of law as to which there is substantial ground for difference of opinion" and whose resolution "may materially advance the ultimate termination of the litigation." 28 U.S.C.§ 1292(b). Under such conditions, "district courts should not hesitate to certify an interlocutory appeal." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 111 (2009).

JOSÉ A. CABRANES, Circuit Judge, joined by DENNIS JACOBS, REENA RAGGI, and DEBRA ANN LIVINGSTON, Circuit Judges, dissenting from the order denying rehearing en banc:

The question presented in this civil case is whether the RICO statute[1] applies extraterritorially.

This is an important question, and it has been answered in a novel and artful way by a panel of our Court. Absent review by the Supreme Court, the panel's interpretation will have a significant and long-term adverse impact on activities abroad that we have heretofore assumed were governed primarily by the laws of the territories where those activities occurred.

After a close and considered vote, the en banc court has decided to forgo the possibility of reviewing the

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[1] 18 U.S.C. §§ 1961-1968.

panel's opinion.[2] From that regrettable decision I respectfully dissent.

If this decision remains undisturbed, the prevailing plaintiffs here, the European Community and its member states,[3] will have achieved a pyrrhic victory, and one that the Community's constituents will have cause to regret in the years ahead. Why? Because its citizens, natural and corporate, are among the likely targets of future RICO actions under the panel's interpretation of the statute.

The panel holds that RICO *itself* has an extraterritorial reach if and when one of RICO's *predicate statutes* has an extraterritorial reach. This reasoning conflates the question of whether RICO applies extraterritorially with whether the statute's definition of "racketeering activity" includes predicate offenses that can be charged abroad. If RICO were merely an additional criminal—or, as is often the case, civil—consequence for committing predicate offenses, this view might have some merit. But, as Judge Raggi's compelling dissent makes clear,

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[2] Note that "the decision not to convene the en banc court does not necessarily mean that a case either lacks significance or was correctly decided. Indeed, the contrary may be true." *United States v. Taylor*, 752 F.3d 254, 256 (2d Cir. 2014) (Cabranes, J., dissenting from the denial of rehearing en banc) (describing the special history of *en bancs* in the Second Circuit and highlighting the various factors that may explain why a judge would vote in favor or against the convening of an en banc court).

[3] The European Community was "a governmental body created through collaboration among the majority of the nations of Europe." Appellant's Br. at 6. Since this lawsuit was originally filed, the European Community has been incorporated into the European Union. *See European Cmty. v. RJR Nabisco. Inc.*, 764 F.3d 129, 148 (2d Cir. 2014).

RICO is not simply designed to pile on punishment. Rather, the statute prohibits distinct behavior: conducting, controlling, or funding an *enterprise* through a *pattern* of racketeering.

The panel overlooks the statutory text, going straight to the definition of "racketeering activity," determining that some predicate acts *are* punishable abroad, and then splitting plaintiffs' RICO claim in two — one "domestic" RICO claim for those predicate acts that are not punishable abroad and that defendants allegedly committed in the United States, and one "extraterritorial" RICO claim for those predicate acts that are punishable abroad. This reasoning is flatly inconsistent with years of precedent from this Court, and the Supreme Court, that treats RICO as an offense distinct from its predicate acts. Although it is indisputable that Congress intended for certain RICO predicate statutes to apply to actions or events abroad, there is no clear basis for concluding that Congress intended for RICO itself to go along with them. For this reason, the panel's opinion also may allow an end-run around the revivified presumption against extraterritoriality in *Morrison*[4] and *Kiobel*.[5]

Indeed, there are many important criminal statutes which expressly make extraterritorial activity indictable but say nothing about the availability of RICO in the circumstances they address—perhaps because legislators were focusing more on the prosecutions of crimes, including some involving acts of terrorism, and not on the treble

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[4] *Morrison v. Nat'l Aus. Bank Ltd.*, 561 U.S. 247 (2010).

[5] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

damages and attorney's fees available under civil actions for damages. It is thus a red herring at best to suggest that, by incorporating a number of mostly terrorism-related crimes within RICO,[6] Congress also intended—without any clear expression of affirmative intent—to give global reach to a whole host of non-terrorism-related[7] civil claims.[8] This is a

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[6] The panel's opinion, Judge Hall's concurrence in support of the order denying rehearing en banc, and Judge Lynch's dissent from the order denying rehearing en banc are all very keen to locate RICO's extraterritoriality within its terrorism-focused predicates. *See RJR Nabisco*, 764 F.3d at 136 (listing a number of RICO's predicate statutes focused on terrorism offenses); Hall Concurrence at 1 ("Many of the predicates that apply to foreign conduct relate to international terrorism."); Lynch Dissent at 1-2 (posing a hypothetical scenario involving a "revolutionary group based largely in a Middle Eastern country" that "plant[s] a bomb near a federal office building" and "behead[s] an abducted American journalist").

[7] Indeed, RICO incorporates many predicates that are quite removed from the dark world of international terrorism. *See* 18 U.S.C. § 1961(1) (incorporating statutes that outlaw trafficking in counterfeit copyrighted work (18 U.S.C. § 2319), embezzlement from pension and welfare funds (18 U.S.C. § 664), and other activities that have little connection to terrorism).

[8] For example, plaintiffs in this Circuit, and others, have sought to use civil RICO claims to challenge supposedly unlawful business practices conducted in foreign countries by alleging, as a predicate act, that one aspect of the scheme involved laundering money through the United States in violation of 18 U.S.C. § 1951. *See, e.g., Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 168 (D.D.C. 2013) (dismissing RICO claim that arose out of "extortion in *Kazakhstan by a Kazakh actor* of Plaintiffs' *Kazakhstan-based* assets"); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517 (S.D.N.Y. 2013) (dismissing RICO claim that related to alleged mismanagement in Iraq of the United Nations Oil-for-Food program); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010) (dismissing RICO claim that alleged,

case of Congress giving an inch and the panel taking a mile. The dubiousness of the panel's stretched reasoning—and its direct tension with *Morrison* and *Kiobel*—is only further reinforced by the fact that a plaintiff need not actually prove any of the extraterritorial predicates in order to sustain *a civil claim* for RICO activities alleged to have occurred entirely outside the United States.[9]

To summarize: After more than four decades of experience with this complicated statute, a panel of our Court has discovered and announced a new, and potentially far-reaching, judicial interpretation of that statute—one that finds little support in the history of the statute, its implementation, or the precedents of the Supreme Court; that will encourage a new litigation industry exposing business activities abroad to civil claims of "racketeering";[10] and that will invite our courts to adjudicate civil RICO claims

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inter alia, that Venezuelan officials and entities damaged a company incorporated in the British Virgin Islands). The panel in *RJR Nabisco*, which identifies money laundering as a predicate act that extends RICO extraterritorially, welcomes such claims into federal court. *See* 764 F.3d at 139-40.

[9] It is also worth noting that the United States, in its *amicus* brief, does not adopt the predicate-centric view of the panel. Needless to say, the Government also does not invoke the panel's view that RICO's criminal predicates extend the extraterritorial jurisdiction of the statute for non-terrorism-related civil claims. *See* Brief of the United States 9-20.

[10] *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 529-30 (1985) (Powell, J., dissenting) (lamenting the expansion of RICO to include civil racketeering charges "brought—in the unfettered discretion of private litigants—in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases").

grounded on extraterritorial activities anywhere in the world.

REENA RAGGI, Circuit Judge, joined by DENNIS JACOBS, JOSÉ A. CABRANES, and DEBRA ANN LIVINGSTON, Circuit Judges, dissenting from the denial of rehearing *en banc*:

Since *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) ("*Morrison*"), courts in this circuit and around the nation uniformly have held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, does not apply extraterritorially. These courts have sometimes differed in how they determined whether a particular RICO application was domestic or extraterritorial, but their underlying assumption has been consistent: "RICO is silent as to any extraterritorial application" and, therefore, "it has none." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) ("*Norex*") (internal quotation marks omitted).[1]

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[1] *See United States v. Chao Fan Xu*, 706 F.3d 965, 974-75 (9th Cir. 2013) (recognizing presumption that RICO does not apply extraterritorially); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159 (D.D.C.2013); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013); *Adhikari v. Daoud & Partners*, No. 09 Civ. 1237, 2013 WL4511354 (S.D. Tex. Aug. 23, 2013); *Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, No. 12 Civ. 9070 (LLS), 2013 U.S. Dist. LEXIS 107222, 2013 WL 3936191 (S.D.N.Y. July 30, 2013); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517 (S.D.N.Y. 2013); *Tymoshenko v. Firtash, No. 11 Civ. 2794 (KMW)*, 2013 U.S. Dist. LEXIS 42754, 2013 WL 1234821 (S.D.N.Y. Mar. 26, 2013); *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933 (N.D. Cal. 2012); *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, No. 8-299, 2012 U.S. Dist. LEXIS 80478, 2012 WL 2093997 (W.D. Pa. June 11, 2012);

In this civil case, a panel of the court untethers RICO from its mooring on United States shores and concludes, for the first time, that the statute reaches overseas—even to a foreign enterprise conducted through an essentially foreign pattern of racketeering—so long as one predicate act is alleged that references conduct that could be prosecuted under a criminal statute that itself reaches extraterritorially. *See European Cmty. v. RJR Nabisco. Inc.*, 764 F.3d 129, 136-37 (2d Cir. 2014) ("*RJR Nabisco*").[2] That same panel concludes that

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Chevron Corp. v. Donziger, 871 F. Supp. 2d 229 (S.D.N.Y. 2012); *Sorota v. Sosa*, 842 F. Supp. 2d 1345 (S.D. Fla. 2012); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011); *United States v. Philip Morris USA. Inc.*, 783 F. Supp. 2d 23 (D.D.C. 2011); *Cedeno v. Intech Grp., Inc.*, 733 F. Supp. 2d 471 (S.D.N.Y. 2010).

[2] As summarized by the *RJR Nabisco* panel, the racketeering scheme here at issue involved a multi-step process beginning with the smuggling of narcotics into Europe by Colombian and Russian criminal organizations, which "laundered" their euro proceeds through money brokers. Those brokers then sold the euros at a discount to cigarette importers who used the money to purchase RJR's cigarettes from wholesalers. The complaint alleges that RJR directed and controlled this money-laundering scheme by, *inter alia*, concealing the identity of cigarette purchasers, shipping cigarettes through Panama to shield the transactions from scrutiny, and bribing Colombian border guards in order to allow its employees to enter the country illegally to receive payments for cigarettes and then to travel to Venezuela, from where funds were wired to RJR Nabisco accounts in the United States. *See RJR Nabisco*, 764 F.3d at 135. In addition to extraterritorially proscribed money laundering, *see* 18 U.S.C. § 1956(f), the complaint charges RJR Nabisco with the predicate extraterritorial crime of providing material support for terrorism insofar as some cigarettes acquired in the described scheme were sold in Iraq to or for the benefit of

whether a RICO claim is domestic or extraterritorial depends not on the locus of the enterprise or the pattern of racketeering (or on some relationship between the two), but instead on the location of particular predicate acts. *See id.* at 140-41. In so holding, the panel rejects the district court's determination that RICO's focus is the enterprise, that the locus of the enterprise determines whether RICO is being applied domestically or extraterritorially, and that RICO has no extraterritorial application to foreign enterprises. *See European Cmty. v. RJR Nabisco, Inc.*, No. 02 Civ. 5771 (NGG), 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *4-7 (E.D.N.Y. Mar. B. 2011).

RJR Nabisco has moved for this court to rehear the case *en banc*. I vote to grant that review because, like a number of my colleagues, I think the panel's treatment of RICO's extraterritorial application conflicts with controlling precedent, specifically, (1) the Supreme Court's holding in *Morrison*, which mandates a presumption against the extraterritorial application of United States statutes unless Congress clearly expresses an affirmative intent to have a statute reach abroad; and (2) our holding in *Norex* (relying on Morrison) that RICO does not apply extraterritorially even though some of its predicate acts are crimes that could be prosecuted extraterritorially.

My concern with the panel's reliance on individual predicate acts to support RICO's extraterritorial reach extends also to its reliance on predicate acts to determine when RICO is being applied domestically

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various terrorist groups. *See* Second Am. Compl. ¶¶ 75-83; 18 U.S.C. § 2339B(d)(2).

and extraterritorially. *Morrison* used the "focus" of a statute to determine its application. 561 U.S. at 266. Precedent emphasizes that RICO's "focus" is *not* the alleged predicate acts, but the relationship between a pattern of racketeering (demonstrated by predicate acts) and an identified enterprise. *See, e.g., United States v. Basciano,* 599 F.3d 184, 205-06 (2d Cir. 2010); *see also United States v. Chao Fan Xu,* 706 F.3d 965, 975 (9th Cir. 2013) (collecting cases identifying either "enterprise" or "pattern of racketeering" as RICO's focus). Nor can the *RJR Nabisco* panel suggest otherwise by characterizing RICO as an aggravating statute that simply adds new consequences to the predicate offenses. *See RJR Nabisco,* 764 F.3d at 135. That premise, from which the rest of the panel's analysis flows, is also at odds with precedent. Successive prosecutions for greater and lesser included offenses implicate double jeopardy. *See Brown v. Ohio,* 432 U.S. 161, 167-69 (1977). But prosecutions for both RICO and predicate acts of racketeering do not. *See United States v. Basciano,* 599 F.3d at 205-06.

In light of these concerns, this court needs to give further consideration to two issues: (1) whether RICO applies extraterritorially, and (2) the criteria for determining whether a RICO claim is domestic or extraterritorial. Insofar as a majority of the active members of the court decline to convene en banc for this purpose, I respectfully dissent.

1. The Extraterritoriality Holdings in Morrison *and* Norex

To explain how the panel decision conflicts with controlling extraterritoriality precedent—both generally, as stated by the Supreme Court in

Morrison, and specifically, as applied to RICO by this court in *Norex*—it is necessary briefly to discuss that precedent.

In *Morrison*, the Supreme Court reaffirmed a strong presumption against the extraterritorial application of any United States statute "unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect." 561 U.S. at 255 (internal quotation marks omitted). *Morrison* found no such clear expression of affirmative intent in Section 10(b) of the Securities Exchange Act of 1934, even though the statute's prohibition of fraud "in connection with the purchase or sale of any security" referenced means or instrumentalities of interstate commerce, which by definition includes commerce with foreign countries. *See* 15 U.S.C. § 78j(b); *id.* § 78c(a)(17). In so holding, the Supreme Court specifically rejected the "conduct" and "effects" tests developed by this court to "discern" when Congress would have wanted a statute, otherwise "silent as to . . . extraterritorial application," to reach abroad. *See Morrison*, 561 U.S. at 255-61 (discussing and rejecting that approach in favor of application of presumption against extraterritoriality "in all cases"). To be sure, Morrison noted that the presumption against extraterritoriality is not a clear statement rule. In short, it does not demand that a statute expressly say "this law applies abroad"; "context can be consulted as well." *Id.* at 265.[3] But *Morrison* emphasized that,

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[3] I understand this to mean statutory context, not legislative history, because if Congress's intent remains uncertain after all canons of construction are applied, *see generally Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007) (allowing consideration of legislative history only in those circumstances),

whatever the purported indicator of extraterritoriality, it must *clearly* and *affirmatively* signal Congress's intent for the statute to reach outside this country's borders. *See id.* Statutory constructions that are merely "possible . . . do not override the presumption against extraterritoriality." *Id.* at 264.[4]

Congress can hardly be said to have clearly expressed its affirmative intent for a statute to reach extraterritorially.

[4] In fact, Congress is generally explicit in stating its intent for a statute to reach extraterritorially. The money laundering and material support predicates alleged here are proscribed by criminal statutes that explicitly provide for extraterritoriality. As to money laundering, Congress has stated,

> There is extraterritorial jurisdiction over the conduct prohibited by this section if—(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

18 U.S.C. § 1956(f). As to material support for terrorism, Congress has stated, "There is extraterritorial Federal jurisdiction over an offense under this section." *Id.* § 2339B(d)(2).

Dozens of other statutes are similarly explicit. *See, e.g., id.* § 1596 (authorizing "extra-territorial jurisdiction" over any human trafficking offense under specified statutory sections if offender is United States national, permanent resident alien, or present in United States); 21 U.S.C. § 959 (stating that prohibition on manufacture or distribution of controlled substances with intent to import "is intended to reach acts of manufacture or distribution committed outside the territorial jurisdiction of the United States").

The intended extraterritorial application of other statutes is made clear from context: they proscribe only conduct occurring outside this country. *See* 18 U.S.C. § 1119 (stating that United States national who "kills or attempts to kill a national of the United States while such national is outside the United States

As this court has long recognized, the "RICO statute is silent as to any extraterritorial application." *North South Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) (emphasis added); *see also United States v. Chao Fan Xu*, 706 F.3d at 974 (9th Cir.) (same). Nevertheless, before *Morrison*, we had borrowed the conduct and effects tests from our securities and antitrust jurisprudence to allow RICO to reach extraterritorially in some circumstances. *See North South Fin. Corp. v. Al-Turki*, 100 F.3d at 1051-52. In *Norex*, however, we acknowledged that *Morrison* abrogated these tests, mandating both a generally applicable presumption and "a bright-line rule: absent a clear Congressional expression of a statute's extraterritorial application, a statute lacks extraterritorial reach." *Norex*, 631 F.3d at 32. Applying this rule to RICO, *Norex* identified no clear expression of congressional intent for extraterritorial application. Indeed, *Norex* reiterated this court's earlier categorical conclusion that the RICO statute is "'silent as to any extraterritorial application,'" *id.* (quoting *North South Fin. Corp. v. Al-Turki*, 100 F.3d at 1051, and declining to treat statement as dictum),

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but within the jurisdiction of another country" is subject to criminal penalties as if act had been committed within special maritime and territorial jurisdiction of United States); *id.* § 1204 (prohibiting retention of "child (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights").

In all these circumstances, courts need not engage in "divining what Congress would have wanted if it had thought of the situation before the court," an exercise prohibited by *Morrison*, 561 U.S. at 261, because Congress has made its extraterritorial intent clear. The RICO statute, however, does not admit such a conclusion.

and concluded therefrom that "'it has none,'" *id.* (quoting *Morrison*, 561 U.S. at 255).[5]

Norex then proceeded to hold that *Morrison* defeated the argument that, just "because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach." *Id.* at 33. In so ruling, *Norex* cited to *Morrison*'s discussion of Section 30(b) of the Exchange Act, *see* 15 U.S.C. § 78dd(b*)* (stating that Act and attending rules and regulations "shall not apply to any person insofar as he transacts a business in securities *without the jurisdiction of the United States*" unless he does so in violation of regulations promulgated "to prevent . . . evasion" of Act (emphasis added)). The Solicitor General had argued that the exemption would have no function if the Act did not apply in the first instance to securities transactions abroad. *See Morrison*, 561 U.S. at 264. While acknowledging that the urged construction was "possible," the Supreme Court concluded that such a possibility was insufficient to overcome the presumption against extraterritoriality. *See id.* (observing that it would be "odd for Congress to indicate the extraterritorial

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[5] Judge Hall, concurring in the denial of rehearing *en banc*, submits that this description of *Norex* is misleading because "*Norex* never said that RICO has no extraterritorial application." Hall, J., Op. Concurring in Denial of *Reh'g En Banc*, ante at []. Perhaps not *in haec verba*. But I respectfully submit that is the conclusion fairly derived from *Norex*'s (1) quotation of *Morrison*'s rule that "'[w]hen a statute gives no clear indication of an extraterritorial application, it has none,'" *Norex*, 631 F.3d at 32 (quoting *Morrison*, 561 U.S. at 255), and (2) its immediately following reiteration that RICO "'is silent as to any extraterritorial application,'" *id.* (quoting *North South Fin. Corp. v. Al-Turki*, 100 F.3d at 1051). Silence is hardly a clear indicator.

application of the whole Exchange Act by means of a provision imposing a condition precedent to its application abroad" or by limiting "enabling regulations . . . to those preventing 'evasion' of the Act, rather than all those preventing 'violation,'" and concluding that provision was "directed at actions abroad that might conceal a domestic violation or might cause what would otherwise be a domestic violation to escape on a technicality"). Indeed, the Supreme Court ruled that, even when a statute clearly "provides for some extraterritorial application," as in the case of Section 30(a), 15 U.S.C. § 78dd(a), "the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison*, 561 U.S. at 265.[6]

Norex's specific reference to this last quoted excerpt from *Morrison*, *see* 631 F.3d at 32, together with its reiteration of RICO's silence "as to any extraterritorial application," *id.* (internal quotation marks omitted), signal that the extraterritorial reach of RICO's predicate acts must also be limited "to [their] terms." The terms of the extraterritorial crimes identified as RICO predicates authorize extraterritorial jurisdiction for prosecutions under

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[6] By its terms, Section 30(a) *expressly* reaches certain extraterritorial securities transactions, notably, when the issuer has prescribed ties to the United States and the defendant broker or dealer acts in contravention of SEC rules and regulations. Thus, the Supreme Court's treatment of Section 30(a)—limiting the extraterritorial reach of that provision to its terms—should not be conflated with its rejection of the argument that Section 30(b) only made sense if the Exchange Act applied extraterritorially. *See Morrison*, 561 U.S. at 263-65.

the referenced proscribing criminal statutes, not for RICO claims alleging such predicates.

To conclude otherwise, the *RJR Nabisco* panel must read *Norex* narrowly to hold only that the inclusion of extraterritorial crimes in RICO's list of predicate acts does not clearly signal Congress's intent for RICO to reach "extraterritorially *in all of its applications*." *RJR Nabisco*, 764 F.3d at 136 (emphasis in original). The panel pronounces it error to interpret *Norex* to hold "that RICO can never have extraterritorial reach in *any* of its applications." *Id.* (emphasis in original). Thus freed from *Norex*'s categorical pronouncement that "RICO is silent as to *any* extraterritorial application," 631 F.3d at 32 (internal quotation marks omitted; emphasis added), the panel concludes that Congress did indeed clearly express its affirmative intent to have RICO reach extraterritorially when a claim—including a civil claim—alleges a pattern of racketeering involving predicate acts proscribed by criminal statutes with extraterritorial reach: "By incorporating these [extraterritorially reaching criminal] statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." *RJR Nabisco*, 764 F.3d at 137. I am not persuaded by this analysis and, thus, think we need to rehear this case *en banc*.

First, the *Norex* decision is not so easily cabined as the *RJR Nabisco* panel suggests. The complaint in *Norex* alleged predicate acts of money laundering by United States citizens in amounts exceeding

$10,000.[7] Such conduct, like the money laundering at issue in *RJR Nabisco*, is specifically proscribed extraterritorially. *See* 18 U.S.C. § 1956(a), (f). Thus, *Norex*'s rejection of RICO extraterritoriality is not factually distinguishable from this case so as to signal only a general rule not applicable when a plaintiff pleads extraterritorial crimes as RICO predicates.

Second, and in any event, *Norex* and *Morrison* do not permit this court to locate a clear expression of *RICO*'s extraterritoriality in pleaded predicates that are themselves extraterritorial crimes. *The RJR Nabisco* panel justifies that conclusion by observing that certain *RICO* predicates reference crimes that apply only to extraterritorial conduct. *See RJR Nabisco*, 764 F.3d at 136 (citing 18 U.S.C.§ 2332(a) (prohibiting killing United States national "while such national is outside the United States"), and *id.* § 2423(c) (prohibiting "engaging in illicit sexual conduct in foreign places")). The panel finds it "hard to imagine why Congress would incorporate these statutes as RICO predicates if RICO could *never* have extraterritorial application." *Id.* at 136 (emphasis in original). *Morrison*, however, effectively declined to recognize such speculative reasoning as a substitute for Congress's clear expression of affirmative intent when it rejected the Solicitor General's argument that an exception to extraterritoriality in the Exchange Act made sense only if the statute applied extraterritorially. *See* 561 U.S. at 263-65.

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[7] *See* First Am. Compl. ¶¶ 5-11, 168-70, 182-234, 304-16, J.A. 5579-81, 5556-57, 5559-68, 5579-81, *Norex Petroleum Ltd. v. Access Indus., Inc.*, No. 07-4553-cv (2d Cir. filed Jan. 9, 2008).

In fact, it is not hard to imagine why Congress would have included exclusively extraterritorial crimes in the list of RICO predicates without necessarily intending to extend RICO's own reach extraterritorially. Domestic enterprises can be conducted through patterns of racketeering manifested by foreign as well as domestic acts. For example, a domestic crime syndicate might be conducted through a pattern of racketeering characterized mostly by domestic drug trafficking and money laundering, but with its continuation enabled by the murder of an American rival trafficker while the rival was outside the United States. Congress could well have determined that prosecutors should be allowed to prove such an extraterritorial murder as a racketeering predicate in an essentially domestic pattern of racketeering to demonstrate the intended continuity of the pattern through which the domestic enterprise would be conducted. *See generally H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239-41 (1989) (discussing relatedness and continuity requirements of racketeering pattern).

Similarly, a foreign terrorist organization might engage in a pattern of racketeering consisting primarily of attacks executed in the United States, but financed with funds collected abroad. *See* 18 U.S.C. § 2339C(a), (b)(2)(C)(ii). Congress could have determined that prosecutors seeking to prove the relationship of the essentially domestic pattern to the foreign enterprise, as well as the means for

ensuring continuity, should be allowed to prove such criminal extraterritorial financing.[8]

What is *not* clear from the inclusion of extraterritorially reaching crimes in the list of RICO predicates, however, is Congress's affirmative intent further to extend RICO's reach to foreign enterprises conducted through essentially foreign patterns of racketeering whenever extraterritorial crimes are alleged predicate acts. The panel submits that such a construction best ensures that "a defendant associated with a foreign enterprise" is not permitted "to escape liability for conduct that indisputably violates a RICO predicate," citing as an example the killing of a United States national abroad, conduct made criminal by 18 U.S.C. § 2332. *RJR Nabisco*, 764 F.3d at 138. The concern is unwarranted. The United States can always prosecute persons for such extraterritorial homicides directly under § 2332. Indeed, it has successfully done so. *See, e.g., In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 107 (2d Cir. 2008) (upholding, *inter alia*, convictions for conspiracy to murder U.S. nationals in violation of § 2332). Moreover, the maximum punishment a defendant would face under § 2332—death—is more, not less, severe than the maximum life sentence he would face if convicted of violating

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[8] This second hypothetical assumes that RICO can apply *domestically* to a foreign enterprise engaged in a *pattern* of racketeering within the United States. The law on this point is not settled, as discussed *infra* at []. The point warrants our consideration *en banc* particularly if, as I explain in that same discussion, RICO's domestic or extraterritorial application cannot be determined by reference to individual predicate acts, which are not the statute's focus. *See Morrison*, 561 U.S. at 267; *United States v. Basciano*, 599 F.3d at 205-06.

RICO with a § 2332 predicate. *Compare* 18 U.S.C. § 2232, *with id.* § 1963(a).

Thus, I respectfully submit that it raises a false alarm to suggest that prosecutors will be thwarted in bringing terrorists to justice unless we recognize RICO to extend extraterritorially to foreign enterprises conducted through foreign patterns of racketeering upon the pleading of any extraterritorial-crime predicate. Rather, it is civil litigants, such as plaintiffs here, who need such a ruling to pursue treble damages in United States courts for foreign racketeering injuries.[9]

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[9] In focusing on terrorism hypotheticals, some of my colleagues reference the legislative objectives of the USA PATRIOT Act, which added certain extraterritorial terrorism crimes to RICO's list of predicates. *See* Hall, J., Op. Concurring in Denial of Reh'g *En Banc, ante* at []; Lynch, J., Op. Dissenting from Denial of Reh'g *En Banc, post* at []. For reasons discussed *supra* at [], I do not think *Morrison* admits consideration of such extra-textual sources in applying the presumption against extraterritoriality.

Furthermore, the cited references indicate only Congress's intent to allow RICO to be used against terrorists. They say nothing about whether that application can be extraterritorial as well as domestic. Indeed, the 9/11 terrorist attacks that prompted the USA PATRIOT Act involved murderous activity *within* the United States by a domestic cell of terrorists affiliated with a foreign organization.

In any event, *RJR Nabisco*'s predicate-based analysis is not limited to terrorism crimes but reaches the range of extraterritorial crimes listed as RICO predicates. For example, Congress included in that list 18 U.S.C. § 2423(c) (prohibiting commercial sex abroad with persons younger than 18). Does that express its clear intent for RICO to apply extraterritorially to a bordello enterprise in Thailand that secures underage prostitutes for American travelers to that country? The mere possibility that Congress's intent could have reached that far is

It is particularly difficult, however, to locate a clear expression of affirmative congressional intent for *civil* RICO claims to reach extraterritorially in the inclusion of extraterritorial crimes in RICO's list of predicates. By their terms, the listed extraterritorial statutes authorize only *criminal* proceedings, not private actions. Victims of such crimes may be awarded restitution as part of a defendant's sentence or may be allowed to petition the government for shares of forfeited proceeds. *See* 18 U.S.C. §§ 3663, 3663A; 28 C.F.R. § 9.1 *et seq.* But the listed extraterritorial statutes—and specifically the money laundering and material support statutes here at issue—themselves afford private persons no civil causes of action. Thus, while the *RJR Nabisco* panel purports to be recognizing RICO extraterritoriality only to the extent "liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate," *RJR Nabisco,* 764 F.3d at 136, it in fact moves RICO well beyond the referenced predicate in concluding that a plaintiff who pleads extraterritorial-crime predicates can pursue a civil RICO claim for treble damages, although Congress provided no civil claim in the predicate criminal statute.

Might Congress have approved such an extension of RICO if it had considered such a circumstance? Possibly. But *Morrison* does not permit courts to apply statutes extraterritorially by "divining what Congress would have wanted if it had thought of the

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not enough to override the presumption against extraterritoriality. *See Morrison,* 561 U.S. at 264. Such caution is all the more warranted when *RJR Nabisco*'s reasoning is applied to a civil RICO claim, for reasons I now discuss in text.

situation before the court." 561 U.S. at 261. No more does it permit the *possibility* of such congressional intent to overcome the presumption against extraterritoriality. *See id.* at 264. Only a clear expression of Congress's affirmative intent that a statute reach extraterritorially can clear that hurdle. *See id.*; *accord Norex*, 631 F.3d at 32.

For the reasons stated, I do not think *Morrison* and *Norex* permit our court to identify such a clear expression of affirmative intent with respect to the civil RICO claim here at issue. Accordingly, the court should rehear this case *en banc* to ensure a RICO extraterritoriality determination consistent with these precedents.

2. The Panel Assigns RICO Predicates a Greater Role than Warranted Under RICO Jurisprudence

The panel's decision to ground RICO's extraterritorial reach in the pleading of certain predicate acts also raises concerns under RICO jurisprudence. It has long been understood that the conduct proscribed by RICO is not the individual predicate acts but, rather, the overall pattern of racketeering activity. *See, e.g.*, *United States v. Basciano*, 599 F.3d at 205-06 ("[I]t is the pattern of racketeering activity, not the predicates, that is punished by a racketeering conviction."); *see generally Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 149 (1987) (observing that "RICO is designed to remedy injury caused by a pattern of racketeering"). More precisely, what RICO prohibits are specified interactions between an identified enterprise and a pattern of racketeering. *See, e.g.*, *United States v. Russotti*, 717 F.2d 27, 33

(2d Cir. 1983) ("[I]t is neither the enterprise standing alone nor the pattern of racketeering activity itself which RICO criminalizes. Rather, the *combination* of these two elements is the object of punishment under RICO." (emphasis in original)). Thus, RICO's focus is not on any particular alleged predicate act but on (1) whether such predicate acts as are proved demonstrate the requisite "pattern of racketeering," a matter largely dependent on their relatedness and continuity, *see H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 239-41; *accord United States v. Daidone*, 471 F.3d 371, 374-76 (2d Cir. 2006); and (2) whether that pattern or its proceeds are used to (a) "invest" in, (b) "acquire or maintain . . . any interest in or control of," or (c) "conduct or participate . . . in the conduct of" the alleged enterprise, 18 U.S.C. § 1962(a)-(c).

I respectfully submit that this precedent does not permit RICO to be construed as a statute that simply "adds new criminal and civil consequences to the predicate offenses." *RJR Nabisco*, 764 F.3d at 135. That construction is further refuted by precedent permitting "a defendant to be prosecuted—either simultaneously or at separate times—for both substantive racketeering and the predicate crimes evidencing the pattern of racketeering." *United States v. Basciano*, 599 F.3d at 205; *cf. Brown v. Ohio*, 432 U.S. at 167-69 (holding that double jeopardy bars successive prosecutions for greater and lesser included offenses).

When the role assigned to predicate acts under our RICO jurisprudence is thus understood—not as the object of the statute, but as a means for satisfying its pattern element—it is difficult to identify a clear expression of affirmative intent for civil RICO claims to reach extraterritorially simply from Congress's

inclusion of some extraterritorially reaching crimes in the list of possible RICO predicates, even when pleaded as part of the pattern of racketeering.

That argument is defeated, in any event, by the fact that RICO does not require proof of every alleged predicate act or of any particular predicate acts. *See United States v. Basciano*, 599 F.3d at 206. The law demands only that a RICO plaintiff prove sufficient predicate acts (but not fewer than two) to demonstrate the required pattern of racketeering. *See id.* In short, a plaintiff alleging a pattern of racketeering evidenced by various RICO predicates—some applying extraterritorially, others applying domestically—might well carry his pattern burden without proving any of the alleged extraterritorial predicates that, under the panel's formulation, are the singular basis for permitting a RICO claim to reach extraterritorially. It would be curious for Congress to locate a statute's extraterritorial reach in an allegation that need not be proved. If, on the other hand, the panel intended to condition RICO's extraterritorial reach on *proof* of the alleged extraterritorial-crime predicates—which is not apparent from its opinion—it departs even further from our RICO jurisprudence in requiring not simply proof of a pattern of racketeering, but proof of particular predicates.

Thus, to ensure consistency in the role our jurisprudence assigns to RICO predicate acts, the court should convene *en banc* to clarify that Congress's identification of some extraterritorial crimes as RICO predicates does not clearly express an affirmative intent for civil RICO claims to reach extraterritorially whenever a plaintiff alleges such crimes as predicate acts.

3. Determining RICO's Domestic and Extraterritorial Application

This case warrants rehearing for yet a third reason: to clarify how courts should distinguish RICO's domestic and extraterritorial applications. Before *RJR Nabisco*, the understanding that RICO does not apply extraterritorially required courts to determine whether a particular RICO claim was domestic or extraterritorial. That inquiry remains necessary after *RJR Nabisco* because the panel, in its effort to distinguish *Norex*, decides that RICO does not apply extraterritorially when the alleged predicates are not extraterritorial crimes. Without regard to the locus of the enterprise or pattern of racketeering, the panel rules that plaintiffs' claim properly applied RICO *extraterritorially* to the extent it alleged extraterritorial-crime predicates, at the same time that the claim properly applied RICO *domestically* to the extent it alleged domestic-crime predicates occurring in the United States. This reliance on individual predicate acts to determine whether a RICO claim is domestic or extraterritorial is at odds with *Morrison*, *Norex*, and our RICO jurisprudence.

In *Morrison*, the Supreme Court concluded that a statute's application is properly determined by its "focus," identified by looking to "the objects of the statute's solicitude." 561 U.S. at 267. Applying this standard to Section 10(b) of the Exchange Act, which prohibits manipulative or deceptive practices in connection with the purchase or sale of securities, *Morrison* concluded that the statute's focus was not on deceptive conduct, but on the purchase or sale of securities in the United States. *See id.* ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the

purchase or sale of any security registered on a national securities exchange or any security not so registered.'" (quoting 15 U.S.C. § 78j(b))). Thus, the Exchange Act—which the Court had already held did not apply extraterritorially—could not be applied domestically to challenge foreign purchases or sales of securities based on deceptive conduct in the United States. Dor estic application required the purchase or sale of securities in this country. *See id.*

In *Norex*, this court cited Morrison to reject a claim that alleged predicate acts of racketeering committed within the United States—mail and wire fraud, money laundering, Hobbs Act and Travel Act violations, and bribery—allowed RICO to apply domestically to an international scheme to take over part of the Russian oil industry. *See Norex*, 631 F.3d at 31-32.

The *RJR Nabisco* panel follows neither *Morrison* nor *Norex* in determining whether plaintiffs' claims here apply RICO extraterritorially or domestically. With no identification of RICO's "focus," as seemingly required by *Morrison*, the *RJR Nabisco* panel looks to predicate acts alone to determine RICO's application, in seeming contravention of *Norex*. Thus, the panel concludes that plaintiffs' claim permissibly applies RICO extraterritorially for those predicate acts occurring abroad (money laundering and support for terrorism), and permissibly applies RICO domestically for those predicate acts occurring in this country (wire fraud, money fraud, and Travel Act violations). *See RJR Nabisco*, 764 F.3d at 140-43. This novel approach—which makes individual predicates determinative of RICO's application without regard to the locus of the overall pattern of

racketeering or the enterprise—warrants *en banc* review for several reasons.

First, this court needs to clarify whether *Morrison* does indeed require courts to look to RICO's "focus" to determine its domestic or extraterritorial application.

Second, the court needs either to identify RICO's "focus" or to resolve the tension between *Norex* and *RJR Nabisco* as to the role predicate acts can play in determining RICO's application.

These matters raise significant challenges. Following *Morrison*, and before *RJR Nabisco*, courts had generally assumed that RICO's domestic or extraterritorial application should be determined by reference to "the 'focus' of congressional concern" in enacting the statute. *Morrison*, 561 U.S. at 266; *see United States v. Chao Fan Xu*, 706 F.3d at 975 (collecting cases). *Norex*'s citation to *Morrison* in its rejection of plaintiffs domestic application argument in that case is consistent with this assumption. *See Norex*, 631 F.3d at 32. Thus, the *RJR Nabisco* panel's failure to identify RICO's focus, or to explain why it did not need to do so to determine the statute's application in this case, creates confusion in this circuit as to *Morrison*'s controlling effect. This court needs to clarify the matter *en banc*.

Further, courts that have applied *Morrison*'s "focus" standard to RICO have found the inquiry "far from clear-cut." *United States v. Chao Fan Xu*, 706 F.3d at 975. "[T]wo camps" have emerged: one locating RICO's focus in the "enterprise," the other in the "pattern of racketeering." *Id.* (collecting cases). The district court in this case joined the first camp based on the fact that RICO prohibits only racketeering activity connected in specified ways to an enterprise,

which it thought paralleled *Morrison*'s construction of the Exchange Act to punish only frauds in connection with domestic securities transactions. *See European Cmty. v. RJR Nabisco. Inc.*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *5 (citing *Morrison*, 561 U.S. at 266-67). By contrast, the Ninth Circuit joined the "pattern" camp, citing Supreme Court decisions stating that "the heart of any RICO complaint is the allegation of a *pattern* of racketeering," *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. at 154 (emphasis in original), and referencing "RICO's key requirement of a pattern of racketeering," *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. at 236. *See United States v. Chao Fan Xu*, 706 F.3d at 976-77.[10]

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[10] In *United States v. Chao Fan Xu*, the Ninth Circuit upheld the domestic application of RICO to defendants' prosecution for scheming "to steal large sums of money from the Bank of China and to get away with it in the United States." 706 F. 3d at 979 (observing that immigration and bank fraud parts of pattern were inextricably linked so that without immigration fraud in United States, bank fraud in China would have been "a dangerous failure"). Thus, while defendants' "pattern of racketeering activity may have been conceived and planned overseas," the court concluded that "it was executed and perpetuated in the United States," allowing for domestic prosecution. *Id.*

Judge Lynch poses certain hypotheticals that might also support RICO's domestic application to foreign enterprises conducted through patterns of racketeering occurring wholly (or at least mainly) in this country. *See* Lynch, J., Op. Dissenting from Denial of Reh'g *En Banc*, *post* at []. But if pattern, rather than enterprise (or enterprise in relation to pattern), is RICO's focus and, thus, determinative of its application, this court should say so *en banc*. In any event, a conclusion that RICO can apply *domestically* to a pattern of racketeering occurring mostly in the United States does not ineluctably lead to a conclusion that Congress intended for RICO to apply *extraterritorially* to a

In *Norex*, this court did not choose between "enterprise" and "pattern" but, rather, considered *both* in concluding that a few predicate acts in the United States were insufficient to allow RICO to be applied domestically to a claim involving a foreign enterprise and an essentially foreign pattern of racketeering. *See* 631 F.3d at 32. But *Norex*'s treatment of the matter is so brief as to preclude a confident conclusion on the focus point. In any event, *Norex* does not specify whether enterprise and pattern should be viewed independently, conjunctively, or alternatively in determining RICO's application.[11]

Where *Norex* is not ambiguous, however, is in its rejection of predicate acts as determinative of RICO's application. This is evident from its affirmance of the dismissal of RICO claims despite allegations that domestic predicate acts were part of the pattern of racketeering. *See* 631 F.3d at 31. It is *RJR Nabisco* that confuses that point by relying exclusively on predicate acts to determine RICO's application. That approach is not only at odds with *Norex* and *Morrison*,

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foreign enterprise conducted through an entirely foreign pattern of racketeering evidenced by predicates prohibited by extraterritorially reaching statutes—Judge Lynch's third hypothetical. *See id.* at []. Certainly, that possibility warrants further careful consideration *en banc*.

[11] In its *amicus* filing, the United States urges that RICO's focus is on both the enterprise and the pattern of racketeering, so that these elements can operate in the alternative to allow RICO to apply domestically if either the enterprise or the overall pattern of racketeering operates in the United States. *See* Br. of United States 7-20. The United States does not argue in favor of the *RJR Nabisco* panel's use of individual predicate acts to determine RICO's application.

but also with our RICO jurisprudence, which as already discussed holds that the object of racketeering "is to conduct the affairs of a charged enterprise through a pattern of racketeering, not to commit discrete predicate acts." *United States v. Pizzonia*, 577 F.3d 455, 459 (2d Cir. 2009); *accord United States v. Basciano*, 599 F.3d at 205-06; *see also United States v. Russotti*, 717 F.2d at 33.

Thus, if *Morrison* does, indeed, require RICO application to be determined by reference to the statute's focus, and if discrete predicate acts are not RICO's focus, this court needs to clarify *en banc* how a court properly determines whether a RICO application is domestic or extraterritorial.

Accordingly, I respectfully dissent from the court's decision not to rehear this case *en banc* to provide needed clarity as to both (1) whether RICO applies extraterritorially, and (2) the criteria for determining whether a RICO claim is domestic or extraterritorial.

GERARD E. LYNCH, Circuit Judge, dissenting from the denial of rehearing *en banc*:

I join in Judge Jacobs's dissent from denial of rehearing *en banc*, because I believe that the tension between the panel's holding in this case, *European Community v. RJR Nabisco. Inc.*, 764 F.3d 129 (2d Cir. 2014), and our prior decision in *Norex Petroleum Ltd. v. Access Industries. Inc.*, 631 F.3d 29 (2d Cir. 2010), should be resolved. But I do not join the other dissenters in their criticisms of the panel's resolution. Because *en banc* review has been denied, I do not need to come to a definitive conclusion about the circumstances under which RICO reaches conduct occurring outside the United States. Largely for the

reasons explained by Judge Hall, however, I am inclined to think that the better outcome would be to adopt the view of the panel in this case and hold that RICO applies to patterns of predicate acts committed abroad where those predicate acts violate federal statutes with express extraterritorial reach.

As Judge Raggi's dissent demonstrates, the very concept of "extraterritorial application" of a complex statute such as RICO is a vexing one. *See* Raggi Dissent at 22-28. Such a question is not easily resolved by sloganeering reference to the presumption against extraterritoriality emphasized in *Morrison v. National Australia Bank. Ltd.*, 561 U.S. 247, 255 (2010). The primary prohibition in RICO, and the one at issue here, criminalizes "conduct[ing] . . . [an] enterprise's affairs . . . through a pattern of racketeering activity." 18 U.S.C.§ 1962(c). The two key elements are the "enterprise" and the "pattern of racketeering." Which, or what combination, of these elements is critical in determining whether any given application of RICO is "extraterritorial"?

Consider the following hypothetical. A leader of a revolutionary group based largely in a Middle Eastern country, in an effort to intimidate the United States to stop supporting that country's government, plots and carries out two crimes: planting a bomb near a federal office building in an American city, resulting in the deaths of several people, and beheading an abducted American journalist in the country where the group primarily operates. The terrorist leader is captured by American forces, and is indicted in the United States for violating RICO. The revolutionary group likely qualifies as an "enterprise" under the definition of that term in

18 U.S.C. § 1961(4). Both terrorist strikes qualify as one or more racketeering acts: the bombing in the United States involves arson and murder, chargeable as felonies under the law of the relevant state, *see* 18 U.S.C. § 1961(1)(A), and the murder of an American abroad is indictable under 18 U.S.C. § 2332(a)(1)—a statute that by its very terms can only be violated by acts outside the United States—which is listed as a RICO predicate under 18 U.S.C. §§ 1961(1)(G) and 2332b(g)(5)(B). Together, these acts very likely form a "pattern of racketeering activity," since they are related to each other in goals, methods, and personnel, and they exhibit continuity because the enterprise has a continuous existence that threatens to involve further such acts. *See* 18 U.S.C. § 1961(5); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 240-42 (1989).

Is this an "extraterritorial" application of RICO? Not an easy question. The enterprise in question is primarily foreign, in its membership, goals, and usual sphere of operation. The pattern of racketeering activity took place partially in the United States and partially abroad, though the foreign portion of the pattern involved conduct that Congress has expressly chosen to reach via the extraterritorial application of American law. Whether to characterize the hypothetical indictment as an "extraterritorial application of RICO" is an interesting conceptual question.

But the actual legal question posed by the hypothetical indictment is whether Congress intended to reach such conduct by the RICO statute, and that, as Judge Hall demonstrates, is a rather easy question to answer. *See* Hall Concurrence at 1-2. Nothing in the definition of "enterprise" excludes

foreign-based associations, groups, or corporations, and it is difficult to believe that Congress intended to exclude them. If members of a Mexican drug cartel, the Sicilian Mafia, or a foreign-based terrorist organization commit a series of violent crimes on U.S. soil that would clearly violate RICO if committed by a local drug distribution gang, a New York-based Mafia family, or the Weather Underground, after all, it would be quite odd to consider the prosecution of such acts in the United States an "extraterritorial" application of RICO, and there is certainly no reason to believe that Congress did not intend to apply RICO to such actions simply because the (entirely American) pattern of racketeering was carried out to further the goals of a foreign enterprise.

Does the outcome change if one predicate crime that formed part of the charged pattern of racketeering activity took place abroad, in violation of a statute that Congress (a) expressly gave extraterritorial reach and (b) expressly made a RICO predicate? I can't see how it does. How can Congress's enactment of a law specifically designed to protect Americans abroad, and its express incorporation of that law into RICO as a predicate crime, constitute anything other than a clear expression of congressional intent to apply RICO to persons who commit that crime, in furtherance of the affairs of an enterprise, as part of a pattern of racketeering? The plain meaning of RICO demands that result. By including certain crimes with extraterritorial application as RICO predicates — including some that can only be committed abroad — Congress unequivocally expressed its intention that RICO apply to patterns of racketeering activity that include such crimes. You may call this an

"extraterritorial" application of RICO if you like, but, whether or not the label is properly applied, there is no doubt that Congress intended to apply RICO in that situation. Nor should that conclusion change if *all* the predicate crimes alleged were committed abroad — if, for example, the revolutionary group planted no bombs on U.S. soil but carried out multiple beheadings of Americans in violation of 18 U.S.C. § 2332(a)(1). So long as Congress expressly extended its criminal prohibitions to the foreign conduct in question and incorporated those prohibitions into RICO, Congress has determined that such predicate crimes can constitute a pattern within the definition of RICO. Presumably it has done so because a pattern of such crimes strikes at American interests just as much as a pattern of terrorist acts committed in the United States by the same foreign-based enterprise.

Of course, none of this suggests an intention to apply RICO, generally, to conduct committed abroad. If members of a foreign enterprise engage in a pattern of entirely *foreign* murders and drug distribution, nothing in RICO could make that activity a crime under U.S. law. Indeed, although applying RICO to such conduct would plainly be an "extraterritorial" application of the statute, we need not even invoke the presumption against extraterritoriality to know that the application is impermissible, because the definitional provisions of RICO make clear that Congress did not define such conduct as a RICO violation. A pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy cannot violate RICO, because murder is a RICO predicate only when it is "chargeable under state law" or indictable under

specific federal statutes. *See* 18 U.S.C. §§ 1961(1)(A), 1961(1)(G). Entirely foreign activity does not qualify, and nothing in RICO indicates any contrary intent to extend its reach to foreign criminality of a similar nature to the domestic conduct covered by RICO. To the extent that *Norex* holds that RICO does not, of its own force and in general, have "extraterritorial" application in such circumstances, it is of course correct.

In that sense, indeed, RICO does not even implicate the extraterritorial ambiguities raised by most statutes. Most congressional statutes prohibit conduct in general terms that, on their face, could be taken to apply to anyone in the world. In *Morrison*, for example, the Supreme Court interpreted a provision of the Securities Exchange Act that makes it "unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device." See 15 U.S.C. § 78j(b). But we know that Congress generally does not intend, by using such broad language as "any person" or "any national securities exchange," to apply those generalized prohibitions to actions that take place outside our borders, because Congress ordinarily legislates to regulate conduct within its primary jurisdiction; that is what the presumption against extraterritorial application means. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 178 (2d Cir. 2014). That presumption applies to RICO as it does to other statutes, but RICO is quite explicit that its prohibitions apply only to patterns of racketeering acts that themselves violate state or

federal law. It does not, for example, say that "no person shall conduct the affairs of an enterprise through a pattern of committing murder," but confines itself to patterns of murder that are chargeable under the law of a state, or that are indictable under specific federal law. Unlike § 10(b), RICO is thus not even susceptible to a literalist reading that its general terms *might* apply to foreigners.

At the same time, however, Congress was exquisitely clear that *some* acts that are committed abroad are predicate acts under RICO, and thus can form a pattern of racketeering activity. To the extent that a pattern consisting of such acts is charged as a violation of RICO, I see nothing in the presumption against extraterritoriality that exempts that pattern from prosecution. It therefore seems to me that there is nothing novel or odd about the idea that RICO does not, in general, "apply extraterritorially," but that it may apply to acts committed abroad where those acts violate statutes that were themselves expressly stated by Congress to have extraterritorial application and that Congress has classified as RICO predicates.

In the present posture of the case, I need not address all of the issues that may arise in working out these basic principles. Nor need I decide how the instant case should be resolved, or whether *Norex* was correctly decided. I join the dissenters in believing that we would do well to convene *en banc* to resolve those very questions, and I agree with them that the reasoning and result in this case are deeply in tension with the reasoning and result in *Norex*, whether or not those two holdings are ultimately irreconcilable. To the extent, however, that the other

dissenters see the panel's approach to RICO and extraterritoriality as deeply disturbing, unprecedented, and inconsistent with *Morrison*, I respectfully disagree. To the contrary, I believe that any interpretation that suggests that operatives of a foreign enterprise cannot be held accountable under RICO for a pattern of predicate crimes that violate federal statutes with express extraterritorial reach would astonish the Congress that made such violations RICO predicates in the first place. Should the Supreme Court take up my dissenting colleagues' invitation to grant further review of this case, I hope and trust that it will not allow the context of this case — a civil action that, like many civil RICO suits, might lead some to doubt the wisdom of allowing a somewhat amorphous statute to be wielded by private interests in endlessly creative ways — to blind it to the clear intention of Congress to apply RICO to foreign terrorist groups who commit patterns of criminal acts that may occur abroad, but that violate American laws with express extraterritorial reach.

APPENDIX E

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides as follows:

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to

mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property

derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the

sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of

which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal Penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed,

removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or

on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or

alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording,

or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the

property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or

indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations

of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of Actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil Investigative Demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive

service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)

(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written

agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so

withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for

the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the

return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the MEMBER STATES it has power to represent, and the Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese

Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden, individually,	
Plaintiffs,	SECOND AMENDED COMPLAINT
- against -	Case No: CV 02-5771-Garaufis
RJR NABISCO, INC., R.J. REYNOLDS TOBACCO COMPANY, (a New Jersey corporation), RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP., RJR NABISCO HOLDINGS CORP., R.J. REYNOLDS TOBACCO HOLDINGS, INC., R.J. REYNOLDS GLOBAL PRODUCTS, INC., REYNOLDS AMERICAN INC., and R.J. REYNOLDS TOBACCO COMPANY, (a North Carolina corporation),	
Defendants.	

Plaintiffs, THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the MEMBER STATES it has power to represent, and the Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden, individually, (hereinafter referred to as the "MEMBER STATES" and together with THE EUROPEAN COMMUNITY, as "PLAINTIFFS"), by and through their undersigned attorneys, for their complaint against Defendants, RJR NABISCO, INC., R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation), RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP., RJR NABISCO HOLDINGS CORP., and R.J. REYNOLDS TOBACCO HOLDINGS, INC. (hereinafter referred to as the "ORIGINAL RJR DEFENDANTS"), and REYNOLDS AMERICAN INC. (RAI), R.J. REYNOLDS GLOBAL PRODUCTS, INC., and R.J. REYNOLDS TOBACCO COMPANY (a North Carolina corporation) (RJRT) (hereinafter referred to as the "RJR SUCCESSOR CORPORATIONS" or collectively with all the RJR entities, as the "REYNOLDS AMERICAN DEFENDANTS" or "RJR DEFENDANTS") and herein allege:

* * *

I. INTRODUCTION

1. For more than a decade, the RJR DEFENDANTS have directed, managed, and controlled money-laundering operations that extended within and/or directly damaged the Plaintiffs. The RJR DEFENDANTS have engaged in and facilitated organized crime by laundering the proceeds of narcotics trafficking and other crimes. As financial institutions worldwide have largely shunned the banking business of organized crime, narcotics traffickers and others, eager to conceal their crimes and use the fruits of their crimes, have turned away from traditional banks and relied upon companies, in particular the RJR DEFENDANTS herein, to launder the proceeds of unlawful activity.

2. The RJR DEFENDANTS knowingly sell their products to organized crime, arrange for secret payments from organized crime, and launder such proceeds in the United States or offshore venues known for bank secrecy. RJR DEFENDANTS have laundered the illegal proceeds of members of Italian, Russian, and Colombian organized crime through financial institutions in New York City, including The Bank of New York, Citibank N.A., and Chase Manhattan Bank. The RJR DEFENDANTS have done business in Iraq, in violation of U.S. sanctions, in transactions that financed both Saddam Hussein's regime and terrorist groups.

3. The RJR DEFENDANTS have, at the highest corporate level, determined that it will be a part of their operating business plan to sell cigarettes as a means of laundering criminal proceeds — that is, to sell cigarettes to and through criminal organizations and to accept criminal proceeds in payment for

cigarettes by secret and surreptitious means, which under U.S. law constitutes money laundering. The officers and directors of the RJR DEFENDANTS facilitated this overarching money-laundering scheme by restructuring the corporate structure of the RJR DEFENDANTS, for example, by establishing subsidiaries in locations known for bank secrecy to direct and implement their money-laundering schemes and to avoid detection by U.S. and European law enforcement. This overarching scheme to launder criminal proceeds by selling cigarettes to criminals was implemented through many subsidiary schemes across THE EUROPEAN COMMUNITY and the United States. Examples of these subsidiary schemes are described in this Complaint and include:

(a.) Money laundering for European organized crime;

(b.) Laundering criminal proceeds in the European Community; and

(c.) Laundering criminal proceeds through Panama.

Numerous additional subsidiary schemes exist that harm THE EUROPEAN COMMUNITY and each of the MEMBER STATES named herein.

4. This civil action is based upon violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), which was specifically intended by Congress to eradicate organized crime on all fronts (including in foreign and interstate commerce) and to deprive violators of their ill-gotten gains. It is also based upon violations of standards of common law, including fraud, negligence, unjust enrichment, public nuisance (federal and state common law), and

conspiracy to commit such torts. Plaintiffs seek damages, equitable relief including disgorgement of profits, and injunctive relief: (a) to enjoin the RJR DEFENDANTS from engaging in money laundering and facilitating organized crime, and (b) to compel the RJR DEFENDANTS to adopt necessary programs and procedures to prevent such conduct in the future. Absent such relief, there will be an increased risk to national security, continued injury to Plaintiffs' business and property, and damage to the vital interests of the United States and Plaintiffs.

II. PARTIES

5. THE EUROPEAN COMMUNITY is a governmental body created as a result of collaboration among the majority of the nations of Western Europe, more specifically, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. Pursuant to the Treaty establishing THE EUROPEAN COMMUNITY, as last amended by the Treaty of Nice (2001), Article 2, THE EUROPEAN COMMUNITY is vested with the responsibility "to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, . . . a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among the Member States." THE EUROPEAN COMMUNITY has certain legal rights and responsibilities. Pursuant to Article 281 of the

Treaty establishing THE EUROPEAN COMMUNITY, THE EUROPEAN COMMUNITY is a legal person. Under the Treaty, the EC can sue and be sued. Pursuant to Article 282 of the Treaty establishing THE EUROPEAN COMMUNITY, THE EUROPEAN COMMUNITY possesses the most extensive legal capacity accorded to legal persons under the laws of the Member States, and it may, in particular, acquire or dispose of property and may be a party to legal proceedings. In such instances, THE EUROPEAN COMMUNITY is represented by the European Commission. Pursuant to Article 280 of the Treaty establishing THE EUROPEAN COMMUNITY, THE EUROPEAN COMMUNITY has the duty to counter fraud and any other illegal activities affecting the financial interests of THE EUROPEAN COMMUNITY through measures which shall act as a deterrent and be such as to afford effective protection in the Member States. THE EUROPEAN COMMUNITY has a duty to protect against harm to the financial institutions and infrastructure within it. THE EUROPEAN COMMUNITY possesses additional duties and authorities that have been conferred upon it by the MEMBER STATES or that it shares with the MEMBER STATES, by virtue of treaty and/or law, including but not limited to the following: (a) the duty and authority to regulate foreign commerce; (b) the duty and authority to regulate and set rules to combat money laundering; (c) the duty and authority to prescribe regulations for the seizure of bank accounts and assets and to take other related actions to combat money laundering and other financial crimes committed against the financial interests of THE EUROPEAN COMMUNITY and the MEMBER STATES; (d) the

duty and authority to ensure and regulate the free movement of goods within THE EUROPEAN COMMUNITY; (e) the duty and authority to regulate safety and security at sea; (f) the duty and authority to regulate and take action to protect against breaches of THE EUROPEAN COMMUNITY Customs Territory or THE EUROPEAN COMMUNITY Customs Border; (g) the duty and authority to regulate ports, customs territories, free-trade zones, and customs-bonded warehouses; (h) the duty and authority to regulate transportation into THE EUROPEAN COMMUNITY or within its borders; and (i) the duty to promote throughout THE EUROPEAN COMMUNITY a harmonious, balanced, and sustainable development of economic activities and to protect and promote the economic well being of its citizens. THE EUROPEAN COMMUNITY has the general duty and the authority to act to abate any harm to itself or to the general public of THE EUROPEAN COMMUNITY within its areas of competence as set forth above. Among the legal rights of THE EUROPEAN COMMUNITY is the right to hold a legal or beneficial interest in property. THE EUROPEAN COMMUNITY is represented in the United States by a Delegation in Washington, D.C. The Delegation has full diplomatic privileges and immunities, and the Head of the Delegation is accorded full ambassadorial status.

6. Each of the MEMBER STATES named as Plaintiffs herein, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian

Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden, is a sovereign State. As such, each MEMBER STATE possesses the legal capacity to acquire, own, or dispose of property and may sue and be sued. Each MEMBER STATE is a "person" as defined under the applicable U.S. law. Each MEMBER STATE has the right to hold a legal or beneficial interest in property. Many of the MEMBER STATES act in a commercial capacity in regard to cigarettes in that they now or have in the past manufactured, sold, and/or been bulk purchasers of cigarettes. As such, the illegal conduct of the RJR DEFENDANTS has directly harmed the commercial interests of the Plaintiffs and has caused them to suffer a loss of money and property. Several of the MEMBER STATES within the EUROPEAN COMMUNITY have held a constitutional monopoly on the domestic manufacture and/or sale of cigarettes. During the period relevant to this complaint, several MEMBER STATES have operated one or more cigarette manufacturing facilities within their borders. These MEMBER STATES, along with other MEMBER STATES, have sold and/or distributed cigarettes, both made by the MEMBER STATES or those which have been legally imported into the MEMBER STATE. By virtue of the aforesaid activities, these MEMBER STATES have been large sellers and, in some instances, the largest sellers and producers of cigarettes within their borders. As such, they have a very large financial stake in the tobacco business and are the most harmed by illegal

competition. As a result of the actions of the RJR DEFENDANTS as set forth more fully below, these MEMBER STATES and the EUROPEAN COMMUNITY have experienced a large reduction in their business and have lost money and property as a result.

7. Within the subject areas of their competency and jurisdiction, THE EUROPEAN COMMUNITY and each of the named MEMBER STATES are the legal entities with the duty and responsibility for enforcing the money and banking laws within their respective jurisdictions. If any entities, including the RJR DEFENDANTS, launder criminal proceeds or commit other illegal acts that violate the money and/or banking laws of the PLAINTIFFS, these PLAINTIFFS have the duty and competency to enjoin and obtain redress for such conduct.

8. RJR NABISCO, INC. was a Delaware corporation and, according to public records, maintained its principal place of business at 1301 Avenue of the Americas, New York, New York 10019-6013. Prior to August 1, 2004, RJR NABISCO, INC. was the parent corporation of R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation) and has participated in the sale and manufacture of cigarettes and other tobacco products both individually and through its agent and instrumentality, DEFENDANT R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation), and related entities and ventures. At all relevant times, RJR NABISCO, INC. assumed an active role in the tobacco business and treated the tobacco business as a department or division of RJR NABISCO, INC. At times pertinent to this complaint, RJR NABISCO, INC., individually and through its

agents, subsidiaries, divisions, or affiliated companies, or ventures, materially participated in the operation and management of the RJR DEFENDANTS' money-laundering enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other RJR DEFENDANTS in the unlawful and fraudulent conduct alleged herein, all of which has affected foreign and interstate commerce. Upon information and belief, based on RJR's public filings, RJR NABISCO, INC., was renamed R.J. REYNOLDS TOBACCO HOLDINGS, INC., a Delaware corporation, and was a direct, wholly owned subsidiary of RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP. During relevant times herein, RJR NABISCO, INC., has conducted continuous and systematic business in the State of New York, maintains a substantial financial presence in the State of New York, utilizes offices of its own and of its affiliated corporations in New York, and is otherwise subject to the jurisdiction of the courts in the State of New York. Following the merger of July 30, 2004, discussed below, RJR NABISCO, INC. is now named R.J. REYNOLDS TOBACCO HOLDINGS, INC.

9. R.J. REYNOLDS TOBACCO COMPANY, as it existed prior to July 30, 2004, was a New Jersey corporation whose principal place of business was located at 401 North Main Street, Winston-Salem, North Carolina 27102. At times pertinent to this complaint, R.J. REYNOLDS TOBACCO COMPANY, individually and through its agents, subsidiaries, divisions, or affiliated companies or ventures, materially participated in the operation and management of the RJR DEFENDANTS' money-

laundering enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other RJR DEFENDANTS in the unlawful and fraudulent conduct alleged herein, all of which has affected foreign and interstate commerce. During relevant times herein, R.J. REYNOLDS TOBACCO COMPANY conducted continuous and systematic business in the State of New York, maintained a substantial financial presence in the State of New York, utilized offices of its own and of its affiliated corporations in New York, and is otherwise subject to the jurisdiction of the courts in the State of New York. The entity previously known as R.J. REYNOLDS TOBACCO COMPANY was absorbed as a part of the merger of July 30, 2004, and, on information and belief, is no longer an active corporation.

10. RJR NABISCO HOLDINGS CORP. was a Delaware corporation whose principal place of business was 1301 Avenue of the Americas, New York, New York 10019-6013. Prior to August 1, 2004, RJR NABISCO HOLDINGS CORP. was the parent corporation of RJR NABISCO, INC. On June 14, 1999, RJR NABISCO HOLDINGS CORP. changed its name to NABISCO GROUP HOLDINGS CORP. In 2001, NABISCO GROUP HOLDINGS CORP. changed its name to RJR ACQUISITION CORP. RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP. was a Delaware corporation whose principal place of business was 7 Campus Drive, Parsippany, New Jersey 07054-0311.

11. On June 14, 1999, RJR NABISCO HOLDINGS CORP. distributed all of the common stock of its subsidiary, R.J. REYNOLDS TOBACCO HOLDINGS, INC., to the shareholders of RJR NABISCO

HOLDINGS CORP. Following the merger of July 30, 2004, RJR ACQUISITION CORP., f/k/a NABISCO GROUP HOLDINGS CORP., to the extent that it still exists, is ultimately a subsidiary of REYNOLDS AMERICAN INC.

12. R.J. REYNOLDS GLOBAL PRODUCTS, INC. was and is a Delaware corporation whose principal place of business is 401 North Main Street, Winston-Salem, North Carolina. Prior to July 30, 2004, R.J. REYNOLDS GLOBAL PRODUCTS, INC. was a subsidiary of R.J. REYNOLDS TOBACCO COMPANY. Since the merger of July 30, 2004, the Defendant, R.J. REYNOLDS GLOBAL PRODUCTS, INC., was and is a subsidiary of REYNOLDS AMERICAN INC.

13. During all relevant times, the holding corporations, identified above in paragraphs 8, 10, and 11, participated, directly and indirectly, in the sale and manufacture of cigarettes and other tobacco products through their agent and instrumentality DEFENDANT R.J. REYNOLDS TOBACCO COMPANY (a New Jersey corporation), and related entities and ventures. These holding corporations assumed an active role in the tobacco business, and at relevant times have treated the tobacco business as a department or division. At times pertinent to this complaint, these holding corporations, individually and through their agents, subsidiaries, divisions, or affiliated companies or ventures, materially participated in the operation and management of the RJR DEFENDANTS' money-laundering enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other RJR DEFENDANTS in the unlawful and fraudulent

conduct alleged herein, all of which has affected foreign and interstate commerce. During relevant times herein, the holding corporations, identified above in paragraphs 8, 10, and 11, conducted continuous and systematic business in the State of New York, maintained a substantial financial presence of their own and their affiliated corporations in New York, and are otherwise subject to the jurisdiction of the courts in the State of New York.

14. The ORIGINAL RJR DEFENDANTS are and were, during all relevant times, involved in directing, managing, and controlling money-laundering operations that extended within and/or directly damaged the PLAINTIFFS. At all times pertinent to this complaint, the ORIGINAL RJR DEFENDANTS, individually and through their employees, agents, joint venturers, coconspirators, subsidiaries, divisions, or affiliated companies, actively directed, managed, and controlled the ORIGINAL RJR DEFENDANTS' money-laundering enterprise, and actively participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of their coconspirators in the unlawful and fraudulent conduct alleged herein, all of which has affected and continues to affect foreign and interstate commerce in the United States.

15. The foregoing RJR corporations, as well as their affiliated entities, ventures, and successors, are and were, during all relevant times, affiliated, consolidated, combined, and unitary entities for purposes of tobacco operations and related activities. Tobacco operations were departments within the RJR corporate family. The ORIGINAL RJR DEFENDANTS maintained control of tobacco operations worldwide through a web of affiliated

entities and joint ventures. This corporate structure was an essential aspect of the ORIGINAL RJR DEFENDANTS' successful efforts to launder the proceeds of criminal activity to the detriment of the PLAINTIFFS.

16. The ORIGINAL RJR DEFENDANTS are and were, during all relevant times, responsible for the acts and omissions of their employees, for acts undertaken within the general area of their authority and for the benefit of the ORIGINAL RJR DEFENDANTS. As alleged herein, the ORIGINAL RJR DEFENDANTS were central figures in the overall conspiracy that actively embarked on and extensively participated in the fraudulent scheme. By means of corporate policies that put the ORIGINAL RJR DEFENDANTS' resources and strategy at the heart of the conspiracy, the ORIGINAL RJR DEFENDANTS were aggressor entities that acted to harm the economic interests of the Plaintiffs.

17. The ORIGINAL RJR DEFENDANTS, during relevant times, adopted a policy that purported to exercise control over the activities of their employees, as well as those of their direct and indirect subsidiaries. Under this policy, which on information and belief is monitored and enforced by RJR's Audit Committee, the ORIGINAL RJR DEFENDANTS have undertaken responsibility for the acts of the employees of the ORIGINAL RJR DEFENDANTS, wherever taken, including acts related to money-laundering activities within Europe and elsewhere which materially injured THE EUROPEAN COMMUNITY and its MEMBER STATES.

18. On or about July 30, 2004, the ORIGINAL RJR DEFENDANTS and Brown & Williamson Tobacco Corporation, (hereinafter Brown & Williamson or B&WTC) entered into a merger which resulted in the creation of several new corporate entities. This included the creation of corporate entities which had names identical to previously existing corporations. The newly created corporate entities are as described below.

19. The Defendant, REYNOLDS AMERICAN INC. (hereinafter referred to as "REYNOLDS AMERICAN" or by its New York Stock Exchange designation "RAI"), is a corporation organized and existing under the laws of the State of North Carolina, which maintains its principal place of business at 401 North Main Street, Post Office Box 2990, Winston-Salem, North Carolina 27102-2990. RAI is the parent corporation to the entity currently known as R.J. REYNOLDS TOBACCO HOLDINGS, INC. (described below and hereinafter referred to as "RJR") and acquired the assets, including the brands of Brown & Williamson Tobacco Corporation. REYNOLDS AMERICAN INC. conducts continuous and systematic business in the State of New York, maintains a substantial financial presence in the State of New York, utilizes offices of its own and of its affiliated corporations in New York, and is otherwise subject to the jurisdiction of the courts in the State of New York.

20. The Defendant, R.J. REYNOLDS TOBACCO HOLDINGS, INC. (hereinafter referred to as "RJR"), is a corporation organized and existing under the laws of the State of Delaware which maintains is principal place of business at 401 North Main Street, Post Office Box 2866, Winston-Salem, North Carolina

27102-2866. R.J. REYNOLDS TOBACCO HOLDINGS, INC. is the parent corporation of R.J. REYNOLDS TOBACCO COMPANY (a North Carolina corporation) (described below and also known as "RJRT"), a wholly owned subsidiary of REYNOLDS AMERICAN INC. RJR is the successor, by June 15, 1999, re-naming, of RJR NABISCO, INC.

21. The Defendant, R.J. REYNOLDS TOBACCO COMPANY (a North Carolina corporation) (hereinafter referred to as "REYNOLDS TOBACCO" or by its New York Stock Exchange designation "RJRT"), is a corporation organized and existing under the laws of the State of North Carolina, which maintains it principal place of business at 401 North Main Street, Winston-Salem, North Carolina 27102-2990. RJRT is a wholly owned subsidiary of R.J. REYNOLDS TOBACCO HOLDINGS, INC. (RJR), which is in turn a wholly owned subsidiary of REYNOLDS AMERICAN INC. (RAI). By virtue of the merger of July 30, 2004, RJRT is the successor in fact to the business of Brown & Williamson Tobacco Corporation and R.J. REYNOLDS TOBACCO COMPANY.

22. The functional result of the above-described merger is that the newly created entity REYNOLDS AMERICAN INC. is the parent company to the ORIGINAL RJR DEFENDANTS and the entities which conducted Brown & Williamson's tobacco business. Former stockholders in the RJR entities now own 58 percent of the stock in REYNOLDS AMERICAN INC., while Brown & Williamson Holdings, Inc. owns 42 percent of the stock of REYNOLDS AMERICAN INC. Many of the money-laundering conspiracies which are more fully described in this complaint have continued

subsequent to the merger of July 30, 2004. At the time of the merger on July 30, 2004, the Defendants REYNOLDS AMERICAN INC., R.J. TOBACCO HOLDINGS, INC., and R.J. REYNOLDS TOBACCO COMPANY (a North Carolina corporation), acquired the money-laundering enterprise of the ORIGINAL RJR DEFENDANTS. The REYNOLDS AMERICAN DEFENDANTS continue to direct, manage, and be responsible for the money-laundering enterprise of their subsidiaries, including the ORIGINAL RJR DEFENDANTS. In addition, there is a new money-laundering enterprise by virtue of the combined activities of the consolidated entity now known as REYNOLDS AMERICAN INC. In addition, the REYNOLDS AMERICAN DEFENDANTS make, ship, sell, and receive payments for traditional "Brown & Williamson-brand" cigarettes subsequent to July 30, 2004, and, as such, are liable for the illegal activities, including the receipt of criminal proceeds, associated with their activities in regard to those brands.

23. The REYNOLDS AMERICAN DEFENDANTS are and were, during all relevant times, involved in directing, managing, and controlling money-laundering operations that extended within and/or directly damaged the PLAINTIFFS. At all times pertinent to this complaint, the REYNOLDS AMERICAN DEFENDANTS , individually and through their employees, agents, joint venturers, coconspirators, subsidiaries, divisions, or affiliated companies, actively directed, managed, and controlled their money-laundering enterprises, and actively participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of their coconspirators in the unlawful and fraudulent conduct alleged herein, all of which has affected and

continues to affect foreign and interstate commerce in the United States.

24. The foregoing DEFENDANTS, as well as their affiliated entities, ventures, and successors, are and were, during all relevant times, affiliated, consolidated, combined, and unitary entities for purposes of tobacco operations and related activities. Tobacco operations were departments within the respective corporate families. The REYNOLDS AMERICAN DEFENDANTS maintained control of tobacco operations worldwide through a web of affiliated entities and joint ventures. This corporate structure was an essential aspect of their successful efforts to launder the proceeds of criminal activity to the detriment of the PLAINTIFFS.

25. The RJR DEFENDANTS are and were, during all relevant times, responsible for the acts and omissions of their employees, for acts undertaken within the general area of their authority and for the benefit of the RJR DEFENDANTS. As alleged herein, the RJR DEFENDANTS were central figures in the overall conspiracy that actively embarked on and extensively participated in the fraudulent scheme. By means of corporate policies that put the RJR DEFENDANTS' resources and strategy at the heart of the conspiracy, the RJR DEFENDANTS were and are aggressor entities that acted to harm the economic interests of the Plaintiffs.

26. The RJR DEFENDANTS, during relevant times, adopted a policy that purports to exercise control of the activities of their employees, as well as those of their direct and indirect subsidiaries. Under this policy, the RJR DEFENDANTS have undertaken responsibility for the acts of the employees of the RJR

DEFENDANTS, wherever taken, including acts related to money-laundering activities within Europe and elsewhere which materially injured THE EUROPEAN COMMUNITY and its MEMBER STATES.

III. JURISDICTION

27. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1337 because the claims of the MEMBER STATES involve allegations of illegal behavior arising under the laws of the United States, including violations of RICO and federal common law. Furthermore, jurisdiction in this Court is proper pursuant to RICO, 18 U.S.C. §§ 1964(a), (c) and 28 U.S.C. § 1651(a). The DEFENDANTS are "persons" within the meaning of 18 U.S.C. § 1961(3). As to all Plaintiffs, jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332 because the matter in controversy exceeds the sum or value of $75,000 and involves parties of diverse citizenship. The Plaintiffs are "persons" within the meaning of 18 U.S.C. § 1961(3). Finally, this Court may exercise jurisdiction over Plaintiffs' non-federal claims pursuant to 28 U.S.C. § 1367, as this Court possesses both federal-question and diversity jurisdiction.

IV. VENUE

28. Venue is proper in this Court pursuant to 18 U.S.C. § 1965(a) because DEFENDANTS reside, are found, have an agent, or transact affairs in this district. Venue is also proper in this Court pursuant to 18 U.S.C. § 1965(b) because, to the extent any DEFENDANT may reside outside of this district, the ends of justice require such DEFENDANT or DEFENDANTS to be brought before the Court.

Venue properly lies in this Court pursuant to 28 U.S.C. § 1391(b)(2) or, alternatively, pursuant to 28 U.S.C. § 1391(a)(2). Further, certain of the conspiratorial acts alleged herein took place within this judicial district.

V. SCOPE

29. For purposes of this complaint, the Plaintiffs do not seek damages or equitable relief from the Defendants that (a) would result in an obligation of indemnity under the Purchase Agreement dated as of March 9, 1999, as amended and restated as of May 11, 1999, among R.J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC. (the "Sellers") and Japan Tobacco Inc. (the "Buyer"), being owed by the Buyer to any member of the Sellers' Group (as defined in the Purchase Agreement); or (b) were released and discharged in the Release executed by THE EUROPEAN COMMUNITY and certain MEMBER STATES dated December 14, 2007. Without limitation, the Plaintiffs seek all available damages and equitable relief in regard to (i) any "RJR-brands" *other than* Camel, Doral, Dorchester, MacDonald, Magna, Maxim, Monte Carlo, More, Now, Passport, Quest, Salem, Select, Vantage, Winchester, Windsor, Winston, and any name variation of those brands; (ii) all "Brown & Williamson brands" sold by the REYNOLDS AMERICAN DEFENDANTS; (iii) all brands manufactured or sold as a result of any joint ventures between RJR and REYNOLDS AMERICAN, INC. and any other companies; and (iv) all cigarette brands, including those referred to above, for sales after December 14, 2007.

VI. THE LINK BETWEEN THE RJR DEFENDANTS' CIGARETTE SALES, MONEY LAUNDERING, AND ORGANIZED CRIME

Money-Laundering Links Between Europe, The United States, Russia, and Colombia

30. Cigarette sales, money laundering, and organized crime are linked and interact on a global basis. According to Jimmy Gurule, former Undersecretary for Treasury Enforcement: "Money laundering takes place on a global scale and the Black Market Peso Exchange System, though based in the Western Hemisphere, affects business around the world. US law enforcement has detected BMPE-related transactions occurring throughout the United States, Europe, and Asia."

31. The primary source of cocaine within THE EUROPEAN COMMUNITY is Colombia. Large volumes of cocaine are transported from Colombia into THE EUROPEAN COMMUNITY and then sold illegally within THE EUROPEAN COMMUNITY and the MEMBER STATES. The proceeds of these illegal sales must be laundered in order to be useable by narcotics traffickers. For many years and continuing to the present day, a primary means by which these cocaine proceeds are laundered is through the purchase and sale of cigarettes, including those manufactured by the RJR DEFENDANTS. Cocaine sales in THE EUROPEAN COMMUNITY are facilitated through money-laundering operations in Colombia, Panama, and elsewhere, which utilize RJR DEFENDANTS' cigarettes as the money-laundering vehicle.

32. In a similar way, the primary source of heroin within THE EUROPEAN COMMUNITY is the

Middle East and, in particular, Afghanistan, with the majority of said heroin being sold by Russian organized crime, Middle Eastern criminal organizations, and terrorist groups based in the Middle East. Heroin sales in THE EUROPEAN COMMUNITY and the MEMBER STATES are facilitated and expedited by the purchase and sale of the RJR DEFENDANTS' cigarettes in money-laundering operations that begin in THE EUROPEAN COMMUNITY and the MEMBER STATES, Eastern Europe, and/or Russia, but which ultimately result in the proceeds of those money-laundering activities being deposited into the coffers of the RJR DEFENDANTS in the United States.

Background on the Convergence of Narcotics Trafficking and Money Laundering

33. This complaint is about Trade and Commerce or, more correctly, illegal Trade and illegal Commerce, and how money laundering facilitates the financing and movement of goods internationally. Merchants engaging in global trade often turn to the more stable global currencies for payments of goods and services purchased abroad. In many markets, the U.S. dollar is the currency of choice and, in some cases, the U.S. dollar is the only accepted form of payment. Merchants seeking dollars usually obtain them in a variety of ways, including the following three methods. Traditional merchants go to a local financial institution that can underwrite credit. Private financing is usually available for those with collateral. A third and least desirable source of dollar financing can be found in the "black markets" of the world. Black markets are the underground or parallel financial economies that exist in every country. These underground economies are

controlled by criminals and their organizations, which generally operate through "money brokers." These "money brokers" often fulfill a variety of roles not the least of which is as an important intermediate step in the laundering process, one that we will refer to throughout this complaint as the "cut out." (See paragraphs 42-45 below.)

34. The criminal activity that provides the dollars for these black-market money-laundering operations is often drug trafficking and related violent crimes. South America is the world leader in the production of cocaine, and the United States and the European Community are the world's largest cocaine markets. Likewise, Colombia and countries in the Middle East produce heroin. Cocaine and heroin are smuggled to the United States and Europe, and are sold for U.S. dollars as well as Euros and local European currencies. Russian drug smugglers obtain heroin from the Middle East and cocaine from South America and sell both drugs in large quantities in the United States and in Europe. Retail street sales of cocaine and heroin have risen dramatically over the past two decades throughout the United States and Europe. Consequently, drug traffickers routinely accumulate vast amounts of illegally obtained cash in the form of U.S. dollars in the United States and Euros in Europe. In 2002, the U.S. Customs Service estimated that illegal drug sales in the United States alone generated an estimated fifty-seven billion dollars in annual revenues, most of it in cash.

35. A drug trafficker must be able to access his profits, to pay expenses for the ongoing operation and to share in the profits; and he must be able to do this in a manner that seemingly legitimizes the origins of his wealth, so as to ward off oversight and

investigation that could result in his arrest and imprisonment and the seizure of his monies. The process by which these goals are achieved is the money-laundering cycle.

36. The purpose of the money-laundering cycle is to establish total anonymity for the participants, by passing cash drug proceeds through financial markets in a way that conceals or disguises the illegal nature, source, ownership, and/or control of the money.

Background on Black-Market Money Exchanges

37. Within Europe, the United States, South America, and elsewhere, a community of illegal currency exchange brokers, known to law-enforcement officials as "money brokers," operates outside the established banking system and facilitates the exchange of narcotics sale proceeds for local cash or negotiable instruments. Many of these money brokers have developed methods to bypass the banking systems and thereby avoid the scrutiny of regulatory authorities. These money brokers have different names depending on where they are located, but they all operate in a similar fashion.

38. A typical "money broker" system works this way: In a sale of Colombian cocaine in THE EUROPEAN COMMUNITY, the drug cartel exports narcotics to the MEMBER STATES where they are sold for Euros. In Colombia, the cartel contacts the money broker and negotiates a contract, in which the money broker agrees to exchange pesos he controls in Colombia for Euros that the cartel controls in Europe. The money broker pays the cartel the agreed-upon sum in pesos. The cartel contacts its cell (group) in THE EUROPEAN COMMUNITY and instructs the

cell to deliver the agreed-upon amount of Euros to the money broker's European agent. The money broker must now launder the Euros he has accumulated in THE EUROPEAN COMMUNITY. He may also need to convert the Euros into U.S. dollars because his customers may need U.S. dollars to pay companies such as the RJR DEFENDANTS for their products.

39. The money broker uses his European contacts to place the monies he purchased from the cartel into the European banking system or into a business willing to accept these proceeds (a process described in more detail below). The money broker now has a pool of narcotics-derived funds in Europe to sell to importers and others. In many instances, the narcotics trafficker who sold the drugs in THE EUROPEAN COMMUNITY is also the importer who purchased the cigarettes. Importers buy these monies from the money brokers at a substantial discount off the "official" exchange rates and use these monies to pay for shipments of items (such as cigarettes), which the importers have ordered from U.S. companies and/or their authorized European representatives, or "cut outs." The money broker uses his European contacts to send the monies to whomever the importer has specified. Often these customers utilize such monies to purchase the RJR DEFENDANTS' cigarettes in bulk and, in many instances, the money brokers have been directed to pay the RJR DEFENDANTS directly for the cigarettes purchased. The money broker makes such payments using a variety of methods, including his accounts in European financial institutions. The purchased goods are shipped to their destinations. The importer takes possession of his goods. The

money broker uses the funds derived from the importer to continue the laundering cycle.

40. In that fashion, the drug trafficker has converted his drug proceeds (which he could not previously use because they were in dollars or Euros) to local currency that he can use in his homeland as profit and to fund his operations; the European importer has obtained the necessary funds from the black-market money broker to purchase products that he might not otherwise have been able to finance (due to lack of credit, collateral, or U.S. dollars, and/or a desire for secrecy); the company selling cigarettes to the importer has received payment on delivered product in its currency of choice, regardless of the source of the funds; and the money broker has made a profit charging both the cartel and the importer for his services. This cycle continues until the criminals involved are arrested and a new cycle begins. Money laundering is a series of such events, all connected and never stopping until at least one link in the chain of events is broken.

41. Many narcotics traffickers who sell drugs in THE EUROPEAN COMMUNITY now also purchase and import cigarettes. In particular, as the trade in cigarettes becomes more profitable and carries lesser criminal penalties compared to narcotics trafficking, the "business end" of selling the cigarettes has become at least as attractive and important to the criminal as the narcotics trafficking. Finally, it makes no difference whatsoever to the money-laundering system whether the goods are imported and distributed legally or illegally. Regardless of whether he sells his cigarettes legally or illegally, the narcotics trafficker has achieved his goal in that he has been able to disguise the nature, location, true

source, ownership, and/or control of his narcotics proceeds. At the same time, the cigarette manufacturer has achieved its goal because it has successfully sold its product in a highly profitable way.

Background on Money Laundering: The "Cut-Out" Strategy

42. There are numerous important steps in any money-laundering cycle. "Dirty" money of necessity moves in a way that is specifically designed to conceal or disguise its nature, source, ownership, and/or control. Successful "layering" of "dirty" transactions often will involve intermediaries, like money brokers, as a matter of necessity and convenience. These "money brokers" play an important role in the laundering conspiracy. They serve to isolate relevant coconspirators from the overt criminal acts, and because of that they are often referred to by law-enforcement agencies as "cut outs." The "cut out" is purposefully inserted into the transaction to create a layer of activity between the overt criminal actors and those receiving the laundered proceeds or profits of the criminal scheme. The "cut out's" role is to shield the true participants in the conspiracy from discovery.

43. In this money-laundering conspiracy, the RJR DEFENDANTS' role will often be masked by the activities of the "cut outs." Consequently, the "cut-out" strategy will be referred to often throughout this complaint. The "cut-out" strategy is also relevant to the sales and marketing end of the international cigarette export cycle. When a cigarette manufacturer intentionally sells its products into criminal distribution channels via carefully selected

wholesalers, so that it can deny responsibility for "where the customer sells the product," the manufacturer is using that wholesaler as a "cut out" to insulate itself from the overt acts involved in the sale of cigarettes as a means of supporting the money-laundering cycle.

44. The cut-out strategy benefits the manufacturers looking to increase market share and those merchants looking to conceal their involvement in legal or illegal business activity. This process develops an unfair business strategy for the manufacturer, which increases its market share by creating a competitive disadvantage. By operating outside the legal framework for fair business operations, the manufacturer creates an unfair advantage for itself as against its competitors in virtually all aspects of business activity, including profit margins, financing terms, price structures, shipping, storage, advertising, regulation (e.g., in the case of cigarettes, health warnings), reporting obligations, and other aspects of business strategy. The resulting "competitive disadvantage" is particularly onerous to domestic companies that must comply with an array of regulations ranging from the sourcing of raw materials to laws governing treatment of their employees. Consequently, domestic manufacturers in THE EUROPEAN COMMUNITY (both state owned and privately owned) are particularly harmed by the cut-out strategy.

45. As will become clear from the RJR DEFENDANTS' use of Giovannex, UETA, and many others, the "cut out" was an integral part of the RJR DEFENDANTS' direction of and participation in this international money-laundering conspiracy.

VII. THE DEVELOPMENT OF THE MONEY-LAUNDERING ENTERPRISES

46. The RJR DEFENDANTS have been aware of organized crime's involvement in the distribution of their products. On January 4, 1978, the Tobacco Institute's Committee of Counsel met in New York City. The Committee of Counsel was the high tribunal that set the tobacco industry's legal, political, and public relations strategy for more than three decades. The January 4, 1978, meeting was called to discuss, among other things, published reports concerning organized crime's involvement in the tobacco trade and the tobacco industry's complicity therein. The published reports detailed the role of organized crime in the tobacco trade (including the Colombo crime family in New York), and the illegal trade at the Canadian border and elsewhere. RJR's general counsel, Max Crohn, attended and participated in the meeting. The large cigarette manufacturers were present at the meeting and/or represented by counsel. The Committee of Counsel took no action to address, investigate, or end the role of organized crime in the tobacco business. Instead, the Committee agreed to formulate a joint plan of action to protect the industry from scrutiny of the U.S. Congress. Notice and the agenda for the meeting, and the minutes of the meeting, were transmitted by the use of the U.S. mails.

47. From June 1999 through August 1, 2004, and continuing to the present day, the RJR DEFENDANTS have undertaken extensive efforts to increase their market share and to expand the sales of their products throughout the world. To accomplish this end, the RJR DEFENDANTS have actively engaged in the sale of their products to

criminals and/or criminal organizations, which can purchase goods with their criminal proceeds only if the payments for those goods are made covertly so as to avoid detection by law enforcement. The RJR DEFENDANTS engaged in such conduct through illegal acts, including money laundering, wire fraud, mail fraud, and other violations of U.S. law. The RJR DEFENDANTS have controlled, directed, encouraged, supported, and facilitated the activities of the criminals who purchase their products. The RJR DEFENDANTS have collaborated with criminals, directly and indirectly, and have sold cigarettes to persons and entities that they know or had reason to know were laundering criminal proceeds through the purchase of cigarettes.

48. By engaging in this illegal conduct the RJR DEFENDANTS have achieved multiple benefits for themselves, including but not limited to the following:

(a.) The RJR DEFENDANTS have increased their cigarette sales because they have new and additional customers, namely, the money launderers and the criminal organizations they service.

(b.) The RJR DEFENDANTS have increased their profit margins because they require the criminals to pay a premium for their cigarettes and/or subject the criminals to sales and credit terms that are more favorable to the RJR DEFENDANTS than those granted to legitimate customers.

(c.) The RJR DEFENDANTS have increased their market share by adding to their customer base to the detriment of their competitors.

(d.) The RJR DEFENDANTS have enhanced the market value of their tobacco

operations, while decreasing the market value of their competitors' operations.

49. The RJR DEFENDANTS, jointly and as individual corporations, control, direct, encourage, support, promote, and facilitate criminal activities that harm THE EUROPEAN COMMUNITY in a variety of ways, including but not limited to the following:

(a.) The RJR DEFENDANTS developed mechanisms and procedures, including the use of cut outs, to allow their criminal customers to pay them for cigarettes in ways that could not be detected by U.S. and European law enforcement. In most instances, the RJR DEFENDANTS mandate that their criminal clients utilize these procedures to ensure that the RJR DEFENDANTS' role in these money-laundering activities will remain undetected.

(b.) The RJR DEFENDANTS accept payments from persons or entities they know, or have reason to know, are criminals and money launderers, and/or from distributors that they know, or have reason to know, are selling cigarettes to criminals and money launderers.

(c.) The RJR DEFENDANTS make arrangements by which the cigarettes they sell can be paid for in such a way that the payments are virtually untraceable.

(d.) The RJR DEFENDANTS make arrangements for payments for their cigarettes to be made into foreign accounts in an attempt to improperly utilize the banking and privacy laws of foreign governments as a shield to protect the criminals from government investigations concerning their activities.

(e.) The RJR DEFENDANTS agree to receive payment for cigarettes by way of third-party checks and other forms of payment executed by persons who have no relationship to the transaction other than that they have provided the funds. Such persons are a common part of money-laundering schemes. Payments for cigarettes by such third-party persons are a clear indication of money-laundering activity.

(f.) The RJR DEFENDANTS established protocols for "layered transactions" that allowed for payment for cigarettes to be made through multiple intermediaries (cut outs) to conceal the ultimate source and nature of the illicit funds.

(g.) The RJR DEFENDANTS invoiced distributors and intermediaries (cut outs) for cigarettes that were sold to criminal customers to conceal the fact that these sales were being made to criminals. In fact, however, the intermediaries and distributors were never expected to pay for the invoiced cigarettes and, at most, would act as pass-through accounts by which the criminals paid the RJR DEFENDANTS for cigarettes.

(h.) The RJR DEFENDANTS generate false or misleading invoices, bills of lading, shipping documents, and other documents that expedite the process by which the cigarettes are secretly delivered to criminals.

(i.) The RJR DEFENDANTS approve their criminal customers on an expedited basis and do not require them to go through the formalities required of legitimate customers.

(j.) The RJR DEFENDANTS engage in a pattern of activity by which they ship cigarettes

designated for one port knowing that the cigarettes in fact will be diverted to another port to be sold illegally and/or in violation of U.S. laws and embargoes.

(k.) The RJR DEFENDANTS have formed, financed, and directed the activities of industry groups to disseminate false and misleading information to Plaintiffs and the public to conceal their illegal activities.

(l.) The RJR DEFENDANTS controlled, directed, encouraged, supported, and facilitated cigarette sales by and to criminals by giving instructions to distributors, shippers, shipping companies, retailers, and/or various other intermediaries so as to effectuate the sale of large amounts of cigarettes by and to criminal organizations.

50. But for the involvement and active assistance of the RJR DEFENDANTS, money launderers and criminals could not have laundered the proceeds of their criminal activities and continued such activities at such levels to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. The members of this vertical group, consisting of the RJR DEFENDANTS, the distributors, the shippers, the criminal customers, currency brokers, and the RJR DEFENDANTS' agents and subsidiaries who receive payment for the cigarettes, work together for the common purpose of depriving Plaintiffs of money and property and engaging in a course of conduct to gain massive profits from the sale of cigarettes as a part of a global money-laundering enterprise while harming Plaintiffs' economic interests. The activities of this core group constitute a conspiracy in law and in fact.

VIII. THE RJR DEFENDANTS' DIRECT INVOLVEMENT IN MONEY LAUNDERING

51. The RJR DEFENDANTS have been actively involved in money laundering for many years, and have carried out their scheme through acts within this district and throughout the State of New York. Examples of the methods and means by which the RJR DEFENDANTS have been complicit in the money-laundering scheme, directly and through the acts of their coconspirators, are set forth below.

RJR's Relationships with Money Launderers

52. The RJR DEFENDANTS have solicited contacts with companies and individuals in Europe, Central America, and the Caribbean that the RJR DEFENDANTS knew, or had reason to know, were money launderers. In approximately 2002, RJR began engaging in a series of acquisitions and joint ventures which caused RJR to enter the international market. At that time, RJR engaged in money-laundering activities. Said money-laundering activities have occurred and continue to occur up to and through the date of this complaint.

53. In light of the dramatic increase of narcotics sales in THE EUROPEAN COMMUNITY in the 2000s, narcotics traffickers and money launderers in THE EUROPEAN COMMUNITY increasingly needed to launder enormous volumes of cash and/or convert their cash from one form of currency to another. The RJR DEFENDANTS wished to increase their market share in certain target markets including THE EUROPEAN COMMUNITY by obtaining additional customers for their product on whom they could rely to sell the cigarettes in the markets targeted by the RJR DEFENDANTS. In

general, it was immaterial to the RJR DEFENDANTS whether the cigarettes were sold legally or illegally, so long as the cigarettes were sold in the target markets. Accordingly, the RJR DEFENDANTS reached an agreement with their coconspirators, the narcotics traffickers and money launderers, that the RJR DEFENDANTS would provide these criminals with the capability to launder the proceeds of their criminal activities, including narcotics trafficking, by purchasing the RJR DEFENDANTS' tobacco products. The RJR DEFENDANTS arranged for secret delivery of the cigarettes and secret means by which the coconspirators could pay for the cigarettes, an essential component of the money-laundering scheme. In return, the narcotics traffickers and money launderers agreed to sell the products in the markets targeted by the RJR DEFENDANTS and sold the cigarettes under the instructions of the RJR DEFENDANTS. In this way, the proceeds of enormous amounts of Colombian cocaine money and Russian heroin money derived from narcotics sales in the United States and THE EUROPEAN COMMUNITY, as well as the proceeds of other crimes, were laundered through the purchase and sale of the RJR DEFENDANTS' products.

54. The RJR DEFENDANTS had a well-established relationship with distributors in Panama, the Caribbean, Eastern Europe, and elsewhere who were well situated to develop and exploit relationships with criminal individuals and organizations. The RJR DEFENDANTS directly and indirectly encouraged their distributors to solicit and/or expand their relationships with customers who were purchasing the cigarettes largely for the

purpose of laundering criminal proceeds. Said practice continues to the present date.

55. The RJR DEFENDANTS entered into agreements and understandings with money launderers and narcotics traffickers in Europe, Russia, and South America to meet the business needs of the RJR DEFENDANTS and their coconspirators. Communications with or on behalf of these individuals were accomplished through a regular use of the U.S. wires and mails.

The RJR Defendants' Direction and Control of the Money-Laundering Scheme

56. The RJR DEFENDANTS controlled every aspect of the financial transactions involving the purchase of their cigarettes. The RJR DEFENDANTS set either favorable or unfavorable financing terms for their customers as a means to reward, punish, and/or control the customers. The RJR DEFENDANTS also controlled the exact methods and means by which the RJR DEFENDANTS were paid for the cigarettes. In this way, the RJR DEFENDANTS structured their payment schemes to maximize their own security from detection by U.S. and European law enforcement.

57. In addition to establishing the rules by which the RJR DEFENDANTS would be paid by cash, Brady Bonds, secret payments to offshore accounts, or other means as described more fully below, the RJR DEFENDANTS also dictated that their criminal customers route payments to the RJR DEFENDANTS through intermediary distributors, shippers, and other cut outs. This procedure, known in money-laundering jargon as "layering," is

conducted for the sole purpose of concealing the payments' true source from THE EUROPEAN COMMUNITY and U.S. law enforcement.

58. In the 2000s, at key distribution points in the European Community, the RJR DEFENDANTS utilized certain companies to handle and sell their products. These companies maintained lists of "direct customers of RJR" which included special handling instructions for shipments designated for RJR customers that the RJR DEFENDANTS knew were involved in criminal activities. These special instructions, directed by the RJR DEFENDANTS, were intended to conceal the true purchaser of the cigarettes and/or the RJR DEFENDANTS' relationship with these special customers. These "direct customer" lists clearly demonstrated that the RJR DEFENDANTS knew that they were selling to criminal customers and thereby demonstrated that the RJR DEFENDANTS knew that they were receiving criminal proceeds in payment for their products.

Cigarette Sales to Launder Narcotics Proceeds

59. The sale of cigarettes has become one of the primary vehicles by which drug traffickers launder their illicit profits. The RJR DEFENDANTS have become a prime recipient of this business. Money brokers routinely purchase large volumes of RJR cigarettes with money that represents the proceeds of illicit drug sales. Representatives of the RJR DEFENDANTS know or should know the source of these funds and their illicit nature, yet the RJR DEFENDANTS continue to receive these funds and to sell cigarettes to these persons and entities.

60. Sales of RJR cigarettes have enabled drug lords to launder their illicit profits. Representatives of the RJR DEFENDANTS are on actual notice that the source of funds used to purchase their cigarettes is drug trafficking, yet the RJR DEFENDANTS continue to receive these funds and to sell cigarettes to these persons and their affiliates. By reason of this conduct, the RJR DEFENDANTS aid, abet, and act in concert with drug lords to launder their ill-gotten gains.

61. The RJR DEFENDANTS have long been on notice that their cigarette sales are linked to money laundering. In or about 1994, the National Coalition Against Crime and Tobacco Contraband, which was funded by RJR and other tobacco companies, retained Lindquist Avey Macdonald Baskerville Inc. ("Lindquist") to investigate and analyze illegal activity involving cigarettes in the United States, among other things. In its August 15, 1994, report, Lindquist observed that: "There are indications that some Colombian cocaine barons still handle cigarettes, but for a different purpose. It is believed that, in some cases, they patriate cocaine profits earned in the United States through cigarette purchases. These cigarettes are imported into Colombia and sold there, providing cocaine traffickers with a seemingly legal alibi for the source of their wealth."

62. That the RJR DEFENDANTS should have known that their distributors were laundering drug proceeds is undeniable. In or about the early 1990s, bank accounts in Miami, Florida, owned by various RJR cigarette distributors, were frozen by U.S. law-enforcement officials because funds credited to those accounts represented laundered drug money. The

freezing of these accounts was well known to the RJR DEFENDANTS. By virtue of this event, the RJR DEFENDANTS were aware or should have been aware that their distributors had been involved in handling laundered narcotics proceeds. In spite of the fact that the conduct of these individuals was known to the RJR DEFENDANTS, the RJR DEFENDANTS continued to develop these relationships actively so as to sell large volumes of cigarettes to these money launderers.

Money Laundering through Central America and the Caribbean

63. Agents and employees of the RJR DEFENDANTS established direct relationships with individuals in Europe, Central America, and the Caribbean who they knew, or should have known, were actively involved in laundering the proceeds of illicit narcotics sales. Executives and employees of the RJR DEFENDANTS traveled to Europe, the Caribbean, and to Central America on multiple occasions for the purpose of meeting and negotiating business agreements with individuals who the RJR DEFENDANTS knew, or should have known, were involved in the laundering of narcotics proceeds. This travel was routinely arranged through the use of the U.S. wires and mails.

64. The development of these relationships with known money launderers was known or should have been known by all the ORIGINAL RJR DEFENDANTS and in particular RJR NABISCO, INC. and R.J. REYNOLDS TOBACCO COMPANY.

Money Laundering through Panama

65. The RJR DEFENDANTS knowingly and intentionally shipped large volumes of cigarettes to

individuals and corporations in certain free-trade zones such as the Colon Free Trade Zone in Panama for the purpose of expediting the money-laundering scheme.

66. Even as to cigarettes whose ultimate destination was nowhere near Panama, the RJR DEFENDANTS shipped cigarettes through cut outs in Panama so that the money launderers could use the secrecy laws of the Republic of Panama as a shield by which to prevent law-enforcement agencies and governments from identifying the true purchasers of the cigarettes. This trade allowed for the movement of laundered money out of Europe without detection. The RJR DEFENDANTS endeavored to conceal the sale of their products into money-laundering channels by transferring the cigarettes to several cut outs in several destinations prior to the ultimate delivery to the final customer and by providing secret and circuitous means by which the cigarettes were paid for.

Distinctions between Sales to Legitimate Customers and Sales to Criminal Customers

67. The RJR DEFENDANTS utilized different business practices depending on whether their customer was a legitimate business customer or a criminal business customer. Criminal customers were handled differently because they represented a greater risk. Specifically, the RJR DEFENDANTS faced a risk that the products intended for criminal customers might be confiscated or the customers arrested. Additionally, the RJR DEFENDANTS took steps to conceal from law-enforcement authorities their relationship with these criminal customers so as to prevent law-enforcement authorities from

becoming aware that the RJR DEFENDANTS were laundering criminal proceeds.

68. Cigarette sales to a legitimate customer can be identified by the following characteristics:

(a.) Customers placed orders directly to the RJR DEFENDANTS through the use of purchase orders. Purchase orders could be communicated by telephone or fax.

(b.) The purchase orders were processed and serviced by warehouses contracted by the RJR DEFENDANTS.

(c.) The wholesaler of the cigarettes was responsible for complying with all applicable laws and the payment of applicable taxes.

(d.) Legitimate customers were usually provided with credit terms. Because credit was being extended, the approval process for a new customer could take a substantial amount of time.

(e.) Legitimate customers routinely make payments directly to the RJR DEFENDANTS via wire transfers.

(f.) Cigarettes purchased by legitimate customers were typically produced and shipped from a single source.

69. In contrast, when the RJR DEFENDANTS sold cigarettes to criminal customers, the procedure often was as follows:

(a.) The customers could not place orders directly to the RJR DEFENDANTS; orders had to be placed with some intermediary company (a cut out).

(b.) If the cigarettes passed through a Free Trade Zone, the customer, not the RJR

DEFENDANTS, coordinated the shipment and transportation instructions with the Free Trade Zone.

(c.) The customer was deemed "responsible" for compliance with applicable law regarding the sale of the cigarettes.

(d.) Sales were often for cash only; no credit or credit terms highly favorable to the RJR DEFENDANTS were offered.

(e.) The RJR DEFENDANTS approved such sales almost immediately without any attempt to "know the customer." In fact, the RJR DEFENDANTS make it a point to not develop a knowledge of the customer so they would not have to admit that they were aware of the customer's criminal activities. Formal applications and waiting periods for approval that were the standard in the industry were circumvented.

(f.) The RJR DEFENDANTS accepted payment by checks payable to intermediary companies, third-party checks, bank checks, third-party wire transfers, and other forms of payment that were not typical in the cigarette trade. Payments often had to be made through "cut outs" to hide or disguise the true nature of the transaction and the participants.

(g.) On some occasions, payments were made directly to the account of an RJR subsidiary in the Caribbean. However, in such instances, those payments were directed to be sent to a numbered account and did not name the RJR DEFENDANTS in the payment details.

(h.) The RJR DEFENDANTS continually switched the banks where payments were to be made to the RJR DEFENDANTS in order to escape

detection by U.S. law enforcement. This process was known within the RJR DEFENDANTS as "musical banks."

(i.) The RJR DEFENDANTS engaged in "dual sourcing," a practice in which cigarettes were sourced from multiple locations or transferred through circuitous and indirect shipping routes to conceal the true customer.

Money-Laundering Mechanisms
Laundering of Cash

70. The way in which the RJR DEFENDANTS laundered narcotics proceeds and the proceeds of other forms of criminal activity evolved. Many of the money-laundering operations were simple and overt, involving meetings between RJR employees and known money launderers in which the RJR employees would receive large volumes of cash in payment for cigarettes, or would be present when these transactions took place.

71. For example, it was virtually a monthly routine that employees of the RJR DEFENDANTS would travel from the US to Colombia by way of Venezuela. These employees, traveling with authorized RJR distributors, would enter Colombia illegally, paying bribes to guards at the Colombian border so that they could enter the country without their passports being stamped. They would then travel by car to various locations such as Maicao where they would meet face to face with money launderers and narcotics traffickers. There the RJR employees would receive payments for cigarettes in the form of bulk cash that may be denominated in U.S. dollars or Venezuelan bolivars. They would also receive easily transferable instruments such as third-

party checks, cashier's checks, and other such instruments. The employees of the RJR DEFENDANTS would then travel back to Venezuela, bribing border guards at the Venezuelan border to ensure that they could move the cash illegally across the border into Venezuela. Once the employees of the RJR DEFENDANTS reached a major Venezuelan city such as Maracaibo they would, by direct or indirect means, wire transfer the funds to bank accounts of the RJR DEFENDANTS in the United States, thereby completing the money-laundering cycle.

72. Throughout this process, the RJR DEFENDANTS and their employees were well aware that they were laundering the proceeds of criminal activities. The great lengths that were taken to conduct these activities in a surreptitious manner demonstrate the knowledge of the RJR DEFENDANTS that these activities were illegal. The process by which these illegal payments were made, received, transported, and laundered was established by high-level executives of the RJR DEFENDANTS. This money-laundering operation could not have occurred without the knowledge and complicity of officers and managers of the RJR DEFENDANTS. The above-described travel was arranged through the use of the U.S. wires and mails and the laundered narcotics proceeds were transferred to the bank accounts of the RJR DEFENDANTS through the U.S. wires and mails.

Money Laundering through Brady Bonds

73. At another time, to avoid the transportation of bulk cash and to conceal further the illegal nature of their transactions, the RJR DEFENDANTS

laundered the proceeds of criminal activities through the use of Brady Bonds. Brady Bonds, named after former United States Secretary of the Treasury Nicholas Brady, were created in association with the IMF and the World Bank as part of an effort to restructure outstanding sovereign loans into liquid debt instruments. Brady Bonds were coupon-bearing bonds for which the principal and interest were collateralized by United States Treasury zero-coupon bonds and other high-grade instruments. Creditor banks exchanged sovereign loans for Brady Bonds incorporating principal and interest guarantees as a means by which debtor governments could have their debts reduced. Issued as registered and/or bearer bonds, Brady Bonds were utilized to restructure the debt in a number of countries, including Venezuela. Brady Bonds are transferable and can be bought and sold through various exchanges.

74. As an example of how Brady Bonds were used to launder narcotics proceeds, employees and/or distributors of the RJR DEFENDANTS traveled to locations such as Maicao, Colombia, to receive payment for cigarettes by cash, check, or money order. Often these payments were made in Venezuelan bolivars, not the preferred currency for the RJR DEFENDANTS. To convert these bolivars into U.S. dollars, the RJR DEFENDANTS and/or their distributors would transport the cash, checks, or money orders to a major city in Venezuela. At that point, they would use the funds in question to purchase Brady Bonds. Once the Brady Bonds were purchased, they would be transferred to an exchange in New York City where they would then be sold for dollars. In this way, the RJR DEFENDANTS could launder the proceeds of criminal activities, convert

the proceeds into U.S. dollars, and deliver them to their bank accounts in New York without detection from law enforcement. The purchase, movement, and sale of the Brady Bonds were expedited through the United States wires and/or mails.

Illegal Sales into Iraq through the European Community

75. In 2001 and 2002, the RJR DEFENDANTS produced and sold new brands of cigarettes that apparently were designed for the Iraqi/Middle East market. Two such brands were Easton and Barton. These cigarette brands, although virtually unknown in the West and unidentified in the RJR DEFENDANTS' annual report, were manufactured by the RJR DEFENDANTS in North Carolina for sale into Iraq.

76. The Easton brand name is purportedly owned by a company known as GMB Inc. located at 401 North Main Street, Winston-Salem, North Carolina. This address is also the address for the corporate offices of the RJR DEFENDANTS. Although GMB Inc. ostensibly owns the brand-name rights to Easton cigarettes, the cigarettes themselves were manufactured by the RJR DEFENDANTS. Easton-brand cigarettes made in the United States were labeled in part: "Manufactured by RJ Reynolds Tobacco Co., Winston-Salem, NC USA exclusively for A.T.C. . . . Made in USA." The Barton Light cigarettes made in the United States were labeled in part: "Manufactured by RJ Reynolds Tobacco Co., Winston-Salem, NC USA. exclusively for A.T.C. . . . Made in USA."

77. The Barton- and Easton-brand cigarettes were sold through the RJR DEFENDANTS' distribution

network into Iraq. Shipments of Easton- and Barton-brand cigarettes, manufactured by the RJR DEFENDANTS, were sold illegally into Iraq as recently as April 2002. Shipments of Barton- and Easton-brand cigarettes were accompanied by promotional materials, including hats, cigarette lighters, key rings, and matches.

78. Examples of illegal shipments of cigarettes into Iraq between January and April 2002 includes:

Barton	4,500 master cases	(10,000 cigarettes per master case)
Easton	1,560 master cases.	

Shipments into Iraq on March 2, 2002, March 23, 2002, March 31, 2002, April 6, 2002, and April 11, 2002, included advertising and promotional materials for the cigarettes.

79. In many instances, the cigarettes in question, even when ostensibly in the possession of the distributor, remained titled to the RJR DEFENDANTS. Thus, the RJR DEFENDANTS maintained control over the shipping, handling, and ultimate delivery of the cigarettes up to and including the time the cigarettes entered Iraq. The aforesaid scheme was accomplished through a continuing use of the U.S. wires and/or mails.

The RJR Defendants and Terrorist Organizations

80. Substantial portions of the cigarettes sold into Iraq were sold to or for the benefit of various terrorist groups, including the PKK (Kurdistan Workers' Party). From June 1999 and up to and including 2002, the RJR DEFENDANTS and their coconspirators sold cigarettes into Iraq by way of the northern territories of Iraq, including the towns of

Dohuk and Zokho. This region is wholly or partially controlled by terrorist groups, including the PKK. The PKK and similar terrorist groups charge a fee for every container of cigarettes that is allowed to pass through their territory. These fees have been paid to the PKK by the RJR DEFENDANTS' coconspirators. Consequently, the RJR DEFENDANTS and their coconspirators have provided direct financial benefits to the PKK and other terrorist groups. Although the regime of Saddam Hussein was often at odds with Kurdish groups in Northern Iraq, the illegal cigarette trade was so lucrative to Saddam Hussein and his family that they allowed several Kurdish groups to import these cigarettes. Saddam Hussein's son Uday Hussein oversaw and personally profited from the illegal importation of cigarettes into Iraq. This racketeering scheme harmed U.S. and EUROPEAN COMMUNITY interests. On May 18, 2004, the United States Department of the Treasury took action to freeze the assets of Uday Hussein's key financial lieutenants in the organized crime enterprise, including (i) Roodi Slewa, who received millions of dollars from the cigarette distributors and paid Uday Hussein approximately $1.5 million per month from the proceeds of this racketeering scheme; and (ii) Nabil Victor Karam, who played a key role in Uday Hussein's racketeering activities in addition to serving as the director of Trading and Transport Services and Alfa Company Limited for International Trading and Marketing, two companies that managed many of Uday Hussein's illegal enterprises.

81. On October 8, 1999, Secretary of State Madeleine K. Albright designated the PKK as a "Foreign Terrorist Organization" (FTO) pursuant to the Antiterrorism and Effective Death Penalty Act of

1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996). As a result of this action, it became illegal for a person in the United States or subject to the jurisdiction of the United States to provide funds or other material support to a designated FTO. On May 10, 2001, Secretary of State Colin L. Powell reaffirmed the designation of the PKK as an FTO on the ground that it has "continued to plan and prepare for possible acts of terrorism."

82. The designation of the PKK as an FTO is consistent with its activities over the course of the past three decades. The PKK was established in the 1970s as a Marxist-Leninist insurgent group primarily composed of Turkish Kurds. In recent years, it has moved beyond rural-based insurgent activities to include urban terrorism. It seeks to establish an independent Kurdish state in southeastern Turkey, where the population is predominantly Kurdish. The PKK's primary targets are the Turkish Government security force in Turkey, but it has also been active in THE EUROPEAN COMMUNITY against Turkish targets. The PKK conducted attacks on Turkish diplomatic and commercial facilities in dozens of Western European cities in 1993 and again in spring 1995. In an attempt to damage Turkey's tourism industry, the PKK has bombed tourist sites and hotels and kidnapped foreign tourists. PKK members in Europe have been involved in the wholesale and retail distribution of heroin and other criminal activities to finance their operations, including the purchase of arms. The PKK has received aid and comfort from

Syria, Iraq, and Iran. On May 24, 2006, affiliates of the PKK claimed responsibility for setting fire to the airport in Istanbul, Turkey, along with at least eight other bombings in Istanbul in 2006. Said bombings have a direct and adverse impact on both the United States and the EUROPEAN COMMUNITY.

83. The PKK has had a particularly adverse affect on THE EUROPEAN COMMUNITY. The PKK has launched numerous terrorist attacks within THE EUROPEAN COMMUNITY. Additionally, the PKK is known to commit an array of other criminal offenses within THE EUROPEAN COMMUNITY, including heroin trafficking and weapons trafficking. Accordingly, the acts of the RJR DEFENDANTS have proximately and directly injured and continue to injure THE EUROPEAN COMMUNITY because the RJR DEFENDANTS' activities enabled the PKK to engage in narcotics trafficking, weapons trafficking, and terrorist activities that occurred within and to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In April 2002, THE EUROPEAN COMMUNITY declared the PKK a terrorist group.

Travel and Entertainment by RJR Employees

84. To advance the money-laundering schemes set forth above, the employees, executives, and managers of the RJR DEFENDANTS often traveled extensively, both to supervise the schemes and also to entertain the RJR DEFENDANTS' criminal customers. RJR executives traveled from the United States to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers. RJR executives and managers who engaged in such travel and entertainment often received large travel

and entertainment budgets from the RJR DEFENDANTS. Some RJR executives received travel and entertainment budgets of up to one million dollars per year for the purpose of advancing the RJR DEFENDANTS' illicit activities in this fashion.

RJR's Efforts to Deceive the Plaintiffs

85. On many occasions over the past decade, government departments of the MEMBER STATES have requested that the RJR DEFENDANTS inspect seized cigarettes to determine whether they were legitimate product and the party to whom the cigarettes were sold. Almost invariably, the RJR DEFENDANTS have indicated that they are unable to determine to whom the product was sold. This was true even as to products that the RJR DEFENDANTS admitted were produced by them.

86. The representations by the RJR DEFENDANTS that they could not identify the customers to whom the products were sold were false and fraudulent. The cigarettes in question contained markings that allow the RJR DEFENDANTS to identify at a minimum the first and second purchasers of the cigarettes. The RJR DEFENDANTS deceived the Plaintiffs and refused to provide this information, which was known to them, in order to protect their valuable criminal customers and also to prevent the Plaintiffs' law-enforcement authorities from conducting investigations that could demonstrate the RJR DEFENDANTS' complicity in the money-laundering schemes.

87. When the RJR DEFENDANTS indicated that they were unable to identify to whom the products were sold, they made a false representation to the Plaintiffs regarding a matter of great importance to

the Plaintiffs. The Plaintiffs reasonably relied upon the representations of the RJR DEFENDANTS because the RJR DEFENDANTS were supposed to be acting in good faith pursuant to cooperation agreements that they entered into with the Plaintiffs. The Plaintiffs have suffered great financial harm as a result of RJR DEFENDANTS' failure to identify the customers to which the seized products were sold. The RJR DEFENDANTS' false statements have made it costly and/or impossible to apprehend the coconspirators who are trafficking in the cigarettes as a part of the scheme to launder criminal proceeds.

88. The RJR DEFENDANTS filed or caused the filing of false and fraudulent documents that misstated the destination and the value of cigarettes. This was done to advance the money-laundering scheme. In many nations, including the MEMBER STATES and Turkey, costly surety bonds are required of shippers that transport cigarettes across the country. By grossly undervaluing the cigarettes being shipped, the RJR DEFENDANTS and their coconspirators reduced the purported value of their shipments and thereby dramatically reduced the surety bonds that must be paid on the cigarettes. In so doing, the RJR DEFENDANTS and their coconspirators reduce their costs associated with the sale and delivery of the cigarettes.

89. With respect to cigarette sales into Iraq, the RJR DEFENDANTS and/or their coconspirators filed false and fraudulent documents with Spanish authorities to conceal that the final destination of the cigarettes was Iraq. The value of the cigarettes in question was fraudulently understated by the RJR DEFENDANTS and/or their coconspirators to expedite the delivery of cigarettes into Iraq with the

payment of minimal surety bonds. THE EUROPEAN COMMUNITY and the MEMBER STATES reasonably relied upon such false and fraudulent documents to their detriment.

90. The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit tortious and illegal acts, including money laundering. In pursuance of the agreement, the RJR DEFENDANTS and other tobacco companies formed, managed, and directed the affairs of several groups including, without limitation: (a) International Committee on Smoking Issues ("ICOSI"); (b) EEC Task Force on Consumerism; (c) International Duty Free Confederation ("IDFC"); (d) "Confederation of European Community Cigarette Manufacturers Ltd." ("CECCM"); and (e) CECCM's "Duty Free Study Group" which was comprised entirely of company representatives, including those of the RJR DEFENDANTS. Acting through the aforesaid groups, the RJR DEFENDANTS obstructed government oversight and falsely represented to Plaintiffs and the public that the RJR DEFENDANTS were not involved in illegal activities.

RJR's Responsibility for its Agents, Employees, and Coconspirators

91. The acts and omissions of the individuals employed by the RJR DEFENDANTS are imputed to the RJR DEFENDANTS under the doctrines of vicarious liability and *respondeat superior*. The RJR DEFENDANTS actually benefited from the performance of predicate acts of racketeering through

increased sales, profits, name-brand recognition, and market share.

92. The RJR DEFENDANTS and their employees were central figures and aggressors in the fraudulent money-laundering scheme. RJR personnel performed the fraudulent and illegal acts described above on behalf of the RJR DEFENDANTS within the scope and course of their employment with the RJR DEFENDANTS. Through their officers and directors, the RJR DEFENDANTS had knowledge of, or were willfully blind and recklessly indifferent toward, the unlawful activity.

93. The RJR DEFENDANTS are liable under principles of agency. Each of the RJR DEFENDANTS is responsible for the conduct of its supervisory employees, who violated the law and caused the RJR DEFENDANTS to enter into and act to further money-laundering conspiracies.

RJR's Use of Wires and Mails

94. During all relevant times, the RJR DEFENDANTS communicated with each other and with their coconspirators on virtually a daily basis by means of U.S. interstate and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question. Under principles of conspiracy and concert of action, the RJR DEFENDANTS are jointly and severally liable for the actions of their coconspirators in the furtherance of the money-laundering scheme.

95. The RJR DEFENDANTS and their coconspirators utilized the interstate and international mail and wires, and other means of

communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities within the United States, THE EUROPEAN COMMUNITY, and the MEMBER STATES in regard to the nature and objectives of the money-laundering scheme. THE EUROPEAN COMMUNITY and its MEMBER STATES, including the Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden, reasonably relied on said misrepresentations of fact, were damaged as a result, and continue to be damaged by such reliance.

96. The RJR DEFENDANTS, their subsidiary corporations, and their coconspirators have used the mail and telephonic and other wire forms of communication on a daily basis in furtherance of the money-laundering schemes described above. Specifically, the U.S. mails and wires are used by the RJR DEFENDANTS to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to the RJR DEFENDANTS and their subsidiaries, and to maintain an accounting of the proceeds received by the RJR DEFENDANTS from the sale of the cigarettes, with said proceeds ultimately being

returned to the RJR DEFENDANTS in the United States.

97. The RJR DEFENDANTS' coconspirators, the distributors and money launderers, utilize the mail and wire communications on a continuing basis to advance the money-laundering schemes, specifically to determine marketing strategies, to order cigarettes, to arrange for sale of the cigarettes, to arrange for distribution of cigarettes, to arrange payments for cigarettes, and to further support other aspects of the money-laundering schemes.

98. Because the money-laundering conspiracy is a multi-million-dollar per year operation and is continuing on a daily basis, it is impractical and impossible, in advance of discovery, to delineate each and every fraudulent communication in what is a pervasive and ongoing use of the mails and wires in furtherance of money-laundering activities. By conducting some of their activities in countries known for bank secrecy, the RJR DEFENDANTS have taken affirmative steps to prevent the victims of their fraud and illicit conduct from discovering the exact details of the vast number of wire and mail communications that furthered the money-laundering schemes, including orders for tobacco products, and repatriation of the proceeds of the money-laundering schemes to the United States.

99. In addition to using the mail and wire communications themselves to advance the money-laundering schemes, the RJR DEFENDANTS caused the use of the U.S. mails and wires in furtherance of the money-laundering schemes by acting with knowledge that the use of the U.S. mails and/or wires would follow in the ordinary course of business and/or

could be reasonably foreseen as a result of their activities. The mailings or use of wire communications were for the purpose of executing the money-laundering schemes. These mail and wire transmissions furthered the money-laundering schemes and were essential to the success of those schemes, since such communications were necessary for the coconspirators, who were separated by great distances and national borders, to effectuate their common goals within the money-laundering enterprises.

IX. THE REYNOLDS AMERICAN DEFENDANTS' ACQUISITION OF BROWN & WILLIAMSON TOBACCO CORPORATION'S BUSINESS

100. On or about July 30, 2004, the Defendant REYNOLDS AMERICAN INC. came into existence by virtue of the merger more fully described in paragraphs 18-22 above. As a result of the merger, the Defendants REYNOLDS AMERICAN INC., R.J. REYNOLDS TOBACCO HOLDINGS, INC., and R.J. REYNOLDS TOBACCO COMPANY (a North Carolina corporation), acquired and became the parent companies to the ORIGINAL RJR DEFENDANTS. Up to and including the date of the merger in question, the ORIGINAL RJR DEFENDANTS were engaged in an active and ongoing Money-Laundering Enterprise as described above. The REYNOLDS AMERICAN DEFENDANTS, in acquiring the assets, liabilities, employees, and operations of the ORIGINAL RJR DEFENDANTS, were fully aware that they were acquiring an active and ongoing Money-Laundering Enterprise.

101. Since the date of the aforesaid acquisition, the REYNOLDS AMERICAN DEFENDANTS, through their agencies, instrumentalities, and coconspirators, have continued forward with the Money-Laundering Enterprise. The REYNOLDS AMERICAN DEFENDANTS have made, sold, and shipped both RJR and Brown & Williamson-brand cigarettes to Panama and elsewhere, and received criminal proceeds in payment for cigarettes, in the same way that the ORIGINAL RJR DEFENDANTS had conducted money laundering for over a decade. Examples of such shipments occurred in August 2004, March 2005, April 2005, May 2005, and October 2005.

102. When the REYNOLDS AMERICAN DEFENDANTS acquired the RJR Money-Laundering Enterprise, it was with the intention that they would continue and build upon said enterprise and further and that they would make use of their newly acquired assets, including the domestic operations of Brown & Williamson, for the purpose of expanding upon their illegal cigarette sales and money-laundering activities.

103. As a result of the above-described merger, the REYNOLDS AMERICAN DEFENDANTS acquired and obtained control over Brown & Williamson as described above. Brown & Williamson was an ongoing business as of the time it was acquired. The REYNOLDS AMERICAN DEFENDANTS understood the business they were acquiring at the time of the acquisition. Since August 2004, following the merger, the agents, employees, instrumentalities, and customers of Brown & Williamson, now acting as agents, instrumentalities, employees, and/or customers of the

REYNOLDS AMERICAN DEFENDANTS, have made cigarettes and have sold cigarettes to criminals and received criminal proceeds in payment for said cigarettes as described below. High-ranking officers of Brown & Williamson were appointed and continue to serve as high-ranking officers of REYNOLDS AMERICAN INC.

Money Laundering Through Panama

104. Since their formation in July 2004, the REYNOLDS AMERICAN DEFENDANTS have both continued the B&WTC business which they acquired and developed money-laundering schemes.

105. An example of the money-laundering scheme is demonstrated by the use of Giovannex in Panama by the REYNOLDS AMERICAN DEFENDANTS. Since August 2004 and continuing at least through 2009, the REYNOLDS AMERICAN DEFENDANTS have manufactured traditional Brown & Williamson-brand cigarettes in the United States and sold them in large volumes to customers throughout the world through the use of their cut out in Panama, Giovannex. On many occasions, including August 2004, February 2005, March 2005, and April 2005, the REYNOLDS AMERICAN DEFENDANTS have made major shipments of product from the United States to Giovannex in Panama. Once the cigarettes are delivered to Giovannex, Giovannex has sold the cigarettes to European Community companies. Shipments of this type have occurred in September 2005, September 2006, and October 2006.

106. In an example of a newly created branch of the scheme, the REYNOLDS AMERICAN DEFENDANTS, over the last two years, have sold

products through a company known as UETA and its sister companies. In a typical example of this scheme, the REYNOLDS AMERICAN DEFENDANTS manufacture either "traditional RJR brands" or "traditional Brown & Williamson brands" and sell them to UETA in Panama. Once UETA takes the cigarettes into its possession, they are delivered to companies in the European Community. Shipments of this type are occurring on a regular basis and have occurred as recently as February 2009.

107. In another variation of the scheme, the REYNOLDS AMERICAN DEFENDANTS manufacture cigarettes which they sell to certain companies in the European Community. These sales are accomplished through a company known as Maritrade Investments Ltd. which lists its corporate offices as being located in Kenilworth, New Jersey, although it actually acts on behalf of a company known as Amec-Rijeka located in Croatia. The European Community companies make payments to the REYNOLDS AMERICAN DEFENDANTS by way of bank accounts in the European Community, with corresponding banks including the American Express Bank in Frankfurt, Germany. Ultimately, the REYNOLDS AMERICAN DEFENDANTS receive payment for these cigarettes in their bank accounts in the United States. Sales of the cigarettes as described above with resulting payments to the REYNOLDS AMERICAN DEFENDANTS have, for example, occurred on August 10, 2006, February 4, 2006, February 25, 2006, March 17, 2006, March 29, 2006, April 16, 2006, May 7, 2006, June 10, 2006, September 12, 2006, February 12, 2007, March 23, 2007, May 19, 2007, June 8, 2007, and on other dates.

108. Sales of REYNOLDS AMERICAN products into illegal channels have increased in 2008 and 2009 as a result of RJR's reacquisition of parts of its "duty-free" business in 2006. Simultaneously, the relative weakness of the U.S. dollar has made authentic "made in the USA" goods a bargain compared to cigarettes manufactured in the EUROPEAN COMMUNITY. This being the case, there has been an increase in demand for the "made in the USA" product. While many other tobacco companies are adhering to anti money-laundering protocols which would make it impossible for criminal organizations to purchase their cigarettes, the REYNOLDS AMERICAN DEFENDANTS have failed to do so.

Money Laundering Through Cigarette Manufacturing and Sales in the European Community

109. Since their inception in July 2004, the REYNOLDS AMERICAN DEFENDANTS have, through their wholly owned subsidiary, R.J. REYNOLDS GLOBAL PRODUCTS, INC., entered into joint ventures for the production and sale of cigarettes which were manufactured in the EUROPEAN COMMUNITY.

110. On or about July 16, 2002, the ORIGINAL RJR DEFENDANTS acquired a fifty percent interest in R.J. Reynolds-Gallaher International SARL, a joint venture intended to produce "American-blend cigarettes" for sale in the EUROPEAN COMMUNITY, with specific marketing targets of France, Spain, the Canary Islands, Italy, Andorra, Belgium, and Luxembourg. On or after the aforesaid acquisition, ownership and control of RJR's interest in the joint venture was placed in the hands

of R.J. REYNOLDS GLOBAL PRODUCTS, INC. In the merger of July 30, 2004, R.J. REYNOLDS GLOBAL PRODUCTS, INC. became a subsidiary of REYNOLDS AMERICAN INC. in order to continue to enhance the RJR DEFENDANTS' money-laundering enterprise.

111. Both before and after July 30, 2004, the primary purpose of R.J. REYNOLDS GLOBAL PRODUCTS, INC. was to expedite the RJR DEFENDANTS' money-laundering enterprise. Consistent with its published business plan, the REYNOLDS AMERICAN DEFENDANTS specifically targeted markets such as Andorra and the Canary Islands in order to accomplish their goal of maximum illegal sales of their tobacco products in exchange for criminal proceeds. The instances of sales for criminal proceeds by the REYNOLDS AMERICAN DEFENDANTS through R.J. REYNOLDS GLOBAL PRODUCTS, INC. are too numerous to be enumerated. They continue up to and including the date of this complaint.

Illegal Sales in the European Community

112. Over the last five years and continuing to the present date, REYNOLDS AMERICAN INC. has been responsible for large cigarette sales into illegal channels in the European Community and has received criminal proceeds in payment for their cigarettes. The market for illegal cigarettes in the European Community is dominated by members of organized crime groups. Accordingly, virtually all of the money received by REYNOLDS AMERICAN INC. as a result of cigarette sales to these channels constitutes criminal proceeds that REYNOLDS

AMERICAN INC. laundered through the sale of cigarettes.

Reynolds American, Inc.'s Exploitation of Port Facilities, Banks, Wires, Mails, and Other Institutions in the European Community

113. Since August 2004, REYNOLDS AMERICAN INC. has been responsible for the distribution of its brands through the EUROPEAN COMMUNITY and into various countries. In addition to exploiting the port facilities of the EUROPEAN COMMUNITY as a part of its illegal scheme, REYNOLDS AMERICAN INC. through its sales to various EUROPEAN COMMUNITY companies misused or caused the misuse of EUROPEAN COMMUNITY wires and mails, banks, warehouses, and other private and public institutions in the EUROPEAN COMMUNITY. In what was and is a pervasive and ongoing illegal scheme, REYNOLDS AMERICAN INC. has been and continues to be responsible for the sales of its products to and through various EUROPEAN COMMUNITY companies with the knowledge that the ultimate destination of its products is the illegal sale of its products into various nations, and with the further knowledge that the proceeds with which REYNOLDS AMERICAN INC. is ultimately paid constitute criminal proceeds.

114. All the aforesaid transactions were accomplished through the use of the U.S. wires and/or mails and EUROPEAN COMMUNITY wires and/or mails. The criminal proceeds utilized to pay for the aforesaid cigarettes passed through financial institutions in the EUROPEAN COMMUNITY and

ultimately into the coffers of REYNOLDS AMERICAN INC. in the United States.

Travel and Entertainment by Reynolds American Inc. Employees

115. Since August 2004, to advance the money-laundering scheme set forth above, the employees, executives, and managers of REYNOLDS AMERICAN INC. often travel extensively, both to supervise the schemes and to entertain REYNOLDS AMERICAN INC.'S customers who have been involved in illegal sales. REYNOLDS AMERICAN INC.'S executives traveled to Europe, South America, and the Middle East to meet with, to entertain, and to maintain relations with these customers.

Reynolds American Inc.'s Efforts to Deceive the Plaintiffs

116. Since August 2004, REYNOLDS AMERICAN INC. caused the filing of false and fraudulent documents that misstated the destination and the value of cigarettes. This was done to advance the money-laundering scheme. The PLAINTIFFS reasonably relied upon the representations of REYNOLDS AMERICAN INC.'S agents because the DEFENDANTS were supposed to be acting in good faith. The PLAINTIFFS have suffered great financial harm as a result of the misrepresentations made by REYNOLDS AMERICAN INC.'S agents.

117. REYNOLDS AMERICAN INC. entered into an understanding or agreement, express or tacit, with its distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit tortious and illegal acts, including money laundering. In pursuance of the agreement, REYNOLDS AMERICAN INC. and

other tobacco companies formed, managed, and directed the affairs of several groups including, without limitation: (a) International Committee on Smoking Issues; (b) EEC Task Force on Consumerism; (c) International Duty Free Confederation; (d) "Confederation of European Community Cigarette Manufacturers Ltd."; and (e) CECCM's "Duty Free Study Group" which was comprised entirely of company representatives, including those of REYNOLDS AMERICAN INC. Acting through the aforesaid groups, REYNOLDS AMERICAN INC. obstructed government oversight and falsely represented to Plaintiffs and the public that REYNOLDS AMERICAN INC. was not involved in illegal activities.

Reynolds American Inc.'s Responsibility for its Agents, Employees, and Coconspirators

118. The acts and omissions of the individuals employed by REYNOLDS AMERICAN INC. are imputed to REYNOLDS AMERICAN INC. under the doctrines of vicarious liability and *respondeat superior*. REYNOLDS AMERICAN INC. actually benefited from the performance of predicate acts through increased sales, profits, name-brand recognition, and market share. REYNOLDS AMERICAN INC. and its employees were central figures and aggressors in the fraudulent scheme, and REYNOLDS AMERICAN INC.'S personnel and executives performed their fraudulent acts on behalf of REYNOLDS AMERICAN INC. within the scope and course of their employment with REYNOLDS AMERICAN INC.

119. REYNOLDS AMERICAN INC. is liable under principles of agency. REYNOLDS AMERICAN

INC. is responsible for the conduct of its employees who had either intentionally disregarded the law or had acted with plain indifference or willful blindness to its requirements.

Reynolds American Inc.'s Use of Wires and Mails

120. During all relevant times since August 2004, REYNOLDS AMERICAN INC. communicated with its coconspirators on virtually a daily basis by means of U.S. interstate and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question. Under principles of conspiracy and concert of action, REYNOLDS AMERICAN INC. is jointly and severally liable for the actions of its coconspirators in the furtherance of the money-laundering scheme.

121. REYNOLDS AMERICAN INC., its subsidiary corporations, and its coconspirators use the mail and telephonic and other wire forms of communication on a continual basis to pay for and confirm billing and payment for cigarettes, to account for the payment of cigarettes to REYNOLDS AMERICAN INC. and its subsidiaries, and to maintain an accounting of the illicit proceeds received by REYNOLDS AMERICAN INC. from the sale of the cigarettes, with said proceeds ultimately being returned to the REYNOLDS AMERICAN INC. in the United States.

122. Since August 2004, and continuing through the present date, REYNOLDS AMERICAN INC.'S coconspirators, the distributors and customers, utilize the mail and wire communications on a continuing basis in order to determine marketing

strategies, order cigarettes, arrange for sale of the cigarettes, arrange for distribution of cigarettes, arrange for payment of cigarettes, and to support other aspects of the money-laundering scheme.

123. At all relevant times since August 2004, REYNOLDS AMERICAN INC. engaged in a scheme to defraud and cheat the Plaintiffs. The scheme to defraud and cheat was inconsistent with moral uprightness, fundamental honesty, fair play and right dealing in the general and business life of members of society. In the execution of or attempt to execute this scheme, REYNOLDS AMERICAN INC. used the U.S. mail in violation of 18 U.S.C. Sections 2 and 1341, and interstate wires, and in violation of 18 U.S.C. Sections 2 and 1343.

124. In that the money-laundering enterprise is a multi-million dollar per year operation and is ongoing on a daily basis, it is impractical and impossible to delineate each fraudulent communication in what is a pervasive and ongoing use of the mails and wires in furtherance of the money-laundering activities.

125. REYNOLDS AMERICAN INC., in addition to using the mail and wire communications itself, caused the mailing and use of wire communications in that it acted with knowledge that the use of the mail and/or wire communications would follow in the ordinary course of business and/or could be reasonably foreseen as a result of its activities; and the mailing or use of wire communications was for the purpose of executing the scheme, to wit, the money-laundering activities. The aforesaid mail and wire transmissions furthered the scheme and were essential to the scheme because the

aforesaid communications were necessary for the coconspirators, who were separated by great distances, to effectuate their common goals within the money-laundering enterprise.

126. REYNOLDS AMERICAN INC. has used, and continues to use, the wires, mails, and Internet to further its scheme to defraud Plaintiffs and deprive them of money and property, while attempting to conceal its complicity in the money-laundering scheme.

127. Since its inception in August 2004, REYNOLDS AMERICAN INC. was a conspirator and direct participant in the affairs of the money-laundering enterprise, and each participant in the conspiracy is responsible for the actions of the others in pursuit of the money-laundering scheme. For the benefit of REYNOLDS AMERICAN INC. and with the knowledge and authorization of high-ranking corporate officials of REYNOLDS AMERICAN INC., REYNOLDS AMERICAN INC., acting with and through its conspirators, agents and employees, carried out the foregoing activities to facilitate the money-laundering scheme.

128. REYNOLDS AMERICAN INC. entered into an understanding or agreement, express or tacit, with its distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit tortious acts and thereby launder criminal proceeds. In pursuance of the agreement, REYNOLDS AMERICAN INC. and its distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting fraud, negligent misrepresentation, unjust

enrichment, public nuisance, and negligence, thereby causing harm to Plaintiffs. REYNOLDS AMERICAN INC., through joint action with its coconspirators, acted tortiously, recklessly, unlawfully, and negligently, to the detriment of Plaintiffs. By means of the aforesaid concerted action, REYNOLDS AMERICAN INC. and its coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein.

129. The above-described money-laundering enterprise, which is an association-in-fact, has generated millions of dollars in illegal profits for REYNOLDS AMERICAN INC. and its coconspirators. A large portion of these illegal profits is returned to the Defendant in its offices and facilities in the United States.

130. All the aforesaid activities occurred with both the knowledge and the direction of persons at both middle management and high-level management positions within the Defendant corporation. A substantial percentage of the cigarettes that are utilized in this enterprise are shipped from the United States.

X. INTEREST OF THE UNITED STATES, THE EUROPEAN COMMUNITY, AND THE MEMBER STATES IN THE RJR DEFENDANTS' SCHEMES

131. International money laundering has become a threat to U.S. security, as well as to the security of THE EUROPEAN COMMUNITY and the MEMBER STATES. As Asa Hutchinson, then Director of the United States Drug Enforcement Administration, has stated: "The illegal drug production that undermines America's culture also

funds terror and erodes democracies across the globe. They all represent a clear and present danger to our national security." Since the money-laundering scheme that is the subject matter of this complaint is a fundamental part of the drug-production cycle, these money-laundering activities represent a threat to U.S. national security as well as the security of THE EUROPEAN COMMUNITY.

132. Money laundering through the purchase and sale of cigarettes has become a primary means by which terrorists finance their illegal activities. The RJR DEFENDANTS knowingly or negligently support the activities of terrorists when they allow terrorist groups to launder narcotics proceeds in THE EUROPEAN COMMUNITY through the purchase of U.S.-made cigarettes.

133. The majority of the conduct of the RJR DEFENDANTS that is material to this case is conducted by the RJR DEFENDANTS in the United States. Further, substantial effects are experienced in the United States and in this district as a result of the schemes that are the subject matter of this complaint because:

(a.) The RJR DEFENDANTS receive, and have received, the profits and proceeds of said schemes in the United States. Such funds have been repatriated to this country through money laundering and other acts of concealment, all of which threaten the integrity of the U.S. financial system.

(b.) The money-laundering schemes that are the subject matter of this complaint, in particular those involving Russian organized crime, are centered largely in and operate from this district.

The majority of the money-laundering activities described in relation to this portion of the scheme occurred in Queens, New York, and tens of millions of dollars of laundered criminal proceeds that constitute the subject matter of this complaint were laundered in Queens, New York.

(c.) The United States and THE EUROPEAN COMMUNITY have recognized in international conventions their mutual interest in ending transnational money-laundering schemes. The RJR DEFENDANTS' conduct contravenes the vital public interest in stemming such illicit conduct.

(d.) Large volumes of false documents have been filed with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms by the RJR DEFENDANTS and/or their coconspirators. The purpose of these filings was to deceive the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms and allow the criminal activity to continue.

(e.) The money-laundering schemes are intertwined with organized crime in New York City. Some of the largest and most dangerous narcotics traffickers in the world reside and conduct business in the Eastern District of New York. Furthermore, certain individuals who work and reside in the Eastern District of New York have established a multi-million dollar industry within the Eastern District of New York for the laundering of criminal proceeds through cigarette sales. Millions of dollars worth of real estate has been purchased within the Eastern District of New York in conjunction with this money-laundering scheme.

(f.) This district and its transportation facilities have been used by the RJR DEFENDANTS as a springboard for the transnational shipment of cigarettes as part of the money-laundering scheme.

(g.) The money-laundering scheme is advanced by numerous acts of wire fraud and mail fraud, many of which occurred in the United States. The United States has an interest in preventing such schemes from being carried out through the U.S. telecommunications system and postal system.

134. Throughout THE EUROPEAN COMMUNITY, cigarettes and narcotics routinely form parts of the same criminal transactions, and the incidence of violence associated with such trade is rising rapidly. High-ranking executives of the RJR DEFENDANTS knew or reasonably should have known that their tobacco products were being sold to and through narcotics traffickers through illegal means. These executives failed to act with reasonable care to investigate and abate these activities and failed otherwise to act to prevent the damage to Plaintiffs.

135. All the aforesaid activities occurred with the knowledge and at the direction of persons at both middle management and high-level management positions within the RJR DEFENDANTS. The vast majority of the cigarettes utilized in the money-laundering schemes are shipped from the United States. The vast majority of the activities of the RJR DEFENDANTS that are the subject matter of this complaint, including management decisions and direction of the schemes, are conducted by the RJR DEFENDANTS in the United States and, more

particularly, from the RJR DEFENDANTS' offices in the State and City of New York.

136. All of the predicate acts set forth herein share the same purpose and the same victims, namely, THE EUROPEAN COMMUNITY and its MEMBER STATES, including the Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden.

The Palermo Convention

137. On December 13, 2000, Under Secretary of State for Global Affairs Frank Loy signed the Palermo Convention on behalf of the United States. The Palermo Convention was enacted in 2000 as a comprehensive treaty to fight organized crime. The Palermo Convention entered into force on September 29, 2003, in accordance with Article 38 of the Convention. It has been signed by all the Plaintiffs in this case and has been ratified by many of the Plaintiffs, including the European Community, Republic of Austria, Kingdom of Belgium, Republic of Cyprus, Kingdom of Denmark, Republic of Finland, French Republic, Federal Republic of Germany, Republic of Hungary, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the

Netherlands, Republic of Poland, Portuguese Republic, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden. The Palermo Convention was ratified by the United States Senate in October 2005 and entered into full force and effect for the United States on or about December 3, 2005.

138. The Palermo Convention demonstrates the overriding U.S. interest in the prevention of transnational organized crime in all forms and, in particular, in relation to narcotics trafficking and money laundering. The Palermo Convention, by its specific terms, confirms that by virtue of the United States' overriding interest in the prevention of organized crime, narcotics trafficking, and money laundering that foreign governments will be granted access to the U.S. courts even if the matter in question wholly or partially involves fiscal (tax) matters.

139. A letter from then Secretary of State, Colin L. Powell, to the President dated January 22, 2004, stated in pertinent part the following:

> The Convention and these two Protocols are the first multilateral law enforcement instruments designed to combat the phenomenon of transnational organized crime. . . . They thus would enhance the United States' ability to render and receive assistance on a global basis in the common struggle to prevent, investigate and prosecute transnational organized crime.
>
> . . . .
>
> . . . Article 6 is of crucial importance to global anti-money-laundering efforts because

it for the first time imposes an international obligation on States Parties to expand the reach of their laundering laws to predicate offenses associated with organized criminal activities other than those related to narcotics trafficking that are addressed in the 1988 United States Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. . . .

. . . .

Article 10 ("Liability of legal persons") compels States Parties to fill what historically has been a loophole in the ability of many states to combat organized crime—their inability to hold not only natural persons but also legal ones liable for illegal conduct. This provision requires the creation of criminal, *civil* or administrative liability, and accompanying sanctions, for corporations that participate in serious crimes involving an organized criminal group or in the offenses covered by the Convention (i.e., serious crimes generally as well as the offenses criminalized). Such corporate liability is without prejudice to the criminal liability of the natural persons who committed the offenses.

. . . .

Pursuant to Article 18 ("Mutual legal assistance"), State Parties are obligated to afford each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offenses within the scope of the Convention, provided that the state seeking

> assistance demonstrates that it has reasonable grounds to suspect that the offense is transnational in nature and involves an organized criminal group. . . .
>
> . . . .
>
> As is the case with extradition, Article 18, paragraph 22 provides that assistance may *not* be refused on the sole ground that the offense involves a *fiscal matter* or on the ground of bank secrecy.

(Emphasis added.)

140. The United States' signing of the Palermo Convention along with the recommendation letter of Secretary of State Powell conclusively demonstrate the United States' interest in the matters complained of in this Complaint without regard to whether they do or do not wholly or partially involve the fiscal (tax) matters of the Plaintiffs.

The USA PATRIOT Act

141. In 2001, the United States Congress passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001. The Act was signed into law by President George W. Bush on October 26, 2001. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

142. The USA PATRIOT Act demonstrates the United States' overarching interests in preventing transnational organized crime, including money laundering and the defrauding of foreign governments. In fact, the USA PATRIOT Act makes fraud against foreign governments a specified

unlawful activity (SUA) so as to bring offenses against foreign governments, such as those pled in this complaint, within the purview of the U.S. money-laundering statutes and RICO.

143. Section 315 of the USA PATRIOT Act expanded the definition of specified unlawful activities to include an array of offenses committed against foreign governments. The USA PATRIOT Act states in pertinent part:

> SEC. 315. INCLUSION OF FOREIGN CORRUPTION OFFENSES AS MONEY LAUNDERING CRIMES.
>
> Section 1956(c)(7) of title 18, United States Code, is amended—
>
> (1) in subparagraph (B)—
>
> . . . .
>
> (C) by adding at the end the following:
>
> . . . .
>
> "(vi) an offense with respect to which the U[illegible]ted States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States;"
>
> . . . .

By virtue of the currently existing multilateral treaties between the United States and the Plaintiffs, most of the offenses complained of in the Plaintiffs' lawsuit are extraditable offenses and, therefore, constitute specified unlawful activities for the money-laundering statute and for RICO. As such, the United States has, by passage of the USA PATRIOT

Act, confirmed the United States' interest in the offenses that constitute the subject matter of this Complaint.

XI. CONTINUING DAMAGE TO THE PLAINTIFFS AND COMPELLING NEED FOR INJUNCTIVE AND EQUITABLE RELIEF

144. THE EUROPEAN COMMUNITY and the MEMBER STATES have the right and duty to make claims for legal, equitable, and declaratory relief for redress against the RJR DEFENDANTS' organized crime and money-laundering conspiracy that is the subject matter of this complaint. As more specifically alleged below, THE EUROPEAN COMMUNITY and the MEMBER STATES are entitled to and hereby seek compensatory damages (or, alternatively, restitution at law), equitable relief (including injunctive relief and disgorgement of ill-gotten gains), punitive damages, declaratory relief, and other remedies available at law and equity.

Compensatory Damages

145. For purposes of this complaint, the Plaintiffs do not seek damages or equitable relief from the Defendants that (a) would result in an obligation of indemnity under the Purchase Agreement dated as of March 9, 1999, as amended and restated as of May 11, 1999, among R.J. REYNOLDS TOBACCO COMPANY, RJR NABISCO, INC. (the "Sellers") and Japan Tobacco Inc. (the "Buyer"), being owed by the Buyer to any member of the Sellers' Group (as defined in the Purchase Agreement); or (b) were released and discharged in the Release executed by THE EUROPEAN COMMUNITY and certain MEMBER STATES dated December 14, 2007. Without limitation, the Plaintiffs

seek all available damages and equitable relief in regard to (i) any "RJR-brands" *other than* Camel, Doral, Dorchester, MacDonald, Magna, Maxim, Monte Carlo, More, Now, Passport, Quest, Salem, Select, Vantage, Winchester, Windsor, Winston, and any name variation of those brands; (ii) all "Brown & Williamson brands" sold by the REYNOLDS AMERICAN DEFENDANTS; (iii) all brands manufactured or sold as a result of any joint ventures between RJR and REYNOLDS AMERICAN, INC. and any other companies; and (iv) all cigarette brands, including those referred to above, for sales after December 14, 2007.

146. As a result of the RJR DEFENDANTS' wrongful activities, THE EUROPEAN COMMUNITY and the MEMBER STATES have been injured in their business and property, and the RJR DEFENDANTS have secured vast profits and proceeds from their illegal scheme. The injuries to the Plaintiffs include, but are not limited to, the following:

(a.) *Lost Sales Due to Money-Laundering Scheme.* Under the laws of the various MEMBER STATES, numerous MEMBER STATES have manufactured and/or distributed and/or sold cigarettes during the time relevant to this complaint. As such, they are direct competitors in the market for cigarettes in the EUROPEAN COMMUNITY and in other markets in which they compete including, but not limited to, the United States. The RJR DEFENDANTS' money-laundering scheme described in this complaint gives the RJR DEFENDANTS an unfair and illegal competitive advantage over the PLAINTIFFS and causes a loss of business and property to the MEMBER STATES because sales

that would have been made by the PLAINTIFFS' legitimate business operations were lost to the DEFENDANTS' money-laundering enterprise.

(b.) *Lost Sales Due to Illegal Distribution Scheme.* In that several of the MEMBER STATES were direct competitors to the RJR DEFENDANTS, every pack of illegally distributed cigarettes unfairly and illegally supplanted sales of PLAINTIFFS' cigarettes. Furthermore, the products distributed illegally by the RJR DEFENDANTS via their criminal scheme gained an unfair and illegal competitive advantage over the PLAINTIFFS whose products did comply with MEMBER STATE law and MEMBER STATE labeling requirements. Health warnings and other information are mandated by MEMBER STATE law and follow a public policy tendency towards these matters espoused by many nations, including the United States. The tobacco products illegally distributed by the RJR DEFENDANTS do not comply with these requirements. This is of benefit to the RJR DEFENDANTS because their noncompliance gives them a competitive advantage over their competitors in the EUROPEAN COMMUNITY market, including the MEMBER STATES. In addition to the unfair and illegal cost savings related to the labeling requirements, the fact that the illegal cigarettes contain different information, are labeled in English, and other factors, are a significant selling point for the illegally distributed product. This translates into an unfair competitive advantage over their direct competitors, the MEMBER STATES of the EUROPEAN COMMUNITY. This is a specifically intended and additional benefit to the RJR DEFENDANTS of their illegal and criminal

distribution scheme, and this causes additional losses to the PLAINTIFFS in that they lose sales.

(c.) *Reduced Value of Sales.* In addition to lost sales, the RJR DEFENDANTS' money-laundering scheme described in this complaint gives the RJR DEFENDANTS an unfair and illegal competitive advantage over the PLAINTIFFS and causes a loss of business and property to the MEMBER STATES because the RJR DEFENDANTS' use of the laundered narcotics proceeds, other criminal proceeds, and the illegal distribution scheme allows the RJR DEFENDANTS to manipulate the prices of their illegally distributed product which is intended to and, in fact, does have the effect of limiting the price at which the PLAINTIFFS can sell their cigarettes. Specifically, this loss is the differential between the greater price at which the PLAINTIFFS could have sold their cigarettes (with no loss in sales volume) and the reduced price at which they are forced to sell their products by the RJR DEFENDANTS' narcotics and other criminal money-laundering scheme. Simply put, but for the RJR DEFENDANTS' narcotics and other criminal money-laundering and illegal distribution scheme, the PLAINTIFFS would be able to demand a higher price for their products without losing any sales because of the higher price. This is an important and specifically intended effect of the RJR DEFENDANTS' scheme.

(d.) *Lost Profits from Cigarette Sales by PLAINTIFFS.* In that the RJR DEFENDANTS' illegal distribution scheme gives the DEFENDANTS an unfair and illegal competitive advantage over their direct competitors, the MEMBER STATES, and illegally supplants the PLAINTIFFS' tobacco sales

and reduces the prices at which the PLAINTIFFS can sell their products, the PLAINTIFFS make less profits from their competitive commercial activity. This, in turn, has a negative effect on the economic viability of the PLAINTIFFS' tobacco operations and, in fact, several MEMBER STATES have had to close down their operations, and/or cut back operations, and/or sell their production and sales facilities. Through their scheme, the RJR DEFENDANTS have acted to unfairly and illegally stifle their competitors, the MEMBER STATES of the EUROPEAN COMMUNITY.

(e.) *Reduction of PLAINTIFFS' Ability to Compete in the United States and Other Markets.* Due to the injuries suffered by the MEMBER STATES of the EUROPEAN COMMUNITY as described in this complaint, these PLAINTIFFS suffered an additional loss in that their ability to compete within the international markets including, but not limited to, the United States of America was reduced. The MEMBER STATES not only produced and distributed cigarettes for domestic consumption, but also for export. These export sales were significant in both volume and value. In that the RJR DEFENDANTS' money-laundering and illegal distribution scheme injured the MEMBER STATES' cigarette manufacturing and distribution entities, as described in this complaint, the MEMBER STATES suffered from a reduced ability to compete in international markets including, but not limited to, the United States. Through their scheme, the RJR DEFENDANTS have acted to unfairly and illegally stifle the MEMBER STATES in their bid for a share of the international cigarette market, including that of the United States.

(f.) *Commercial Losses of the MEMBER STATES.* The RJR DEFENDANTS' money-laundering activities and their related conduct compete against the legal cigarette trade within the MEMBER STATES and in particular compete against the MEMBER STATES that participate in the marketplace as either buyers or sellers of cigarettes. Entities that purchase and sell cigarettes using laundered money enjoy an unfair competitive advantage over legitimate businesses due to favorable exchange rates, lack of government oversight, and other factors favoring the illegitimate trader. Legitimate purchasers, manufacturers, and/or distributors of cigarettes are direct competitors of the money-laundering conspirators. As participants in the marketplace, the MEMBER STATES suffer a direct loss of money and property as a result of this illegal activity.

(g.) *Damage to MEMBER STATES as Manufacturers and Distributors of Cigarettes.* Certain MEMBER STATES possessed and have the exclusive right to import and distribute cigarettes within that MEMBER STATE. These MEMBER STATES have been adversely affected in their business and property as a direct result of the massive money-laundering scheme to convert criminal proceeds into cigarettes, which was designed, implemented, and controlled by the RJR DEFENDANTS. The unfair advantage that the money-laundering scheme afforded to the RJR DEFENDANTS impaired the ability of the MEMBER STATES to compete effectively in their own cigarette markets. As a result, warehouses and other distribution facilities have been closed or otherwise rendered useless, and the MEMBER STATES, as

rightful distributors of cigarettes, lost millions of dollars, both in lost cigarette sales as well as in the costs associated with the closing of factories, discharge of employees, and other measures made necessary by the illegal acts of the RJR DEFENDANTS and their coconspirators.

(h.) *DEFENDANTS' Misuse and Disruption of the Marketplace.* THE EUROPEAN COMMUNITY provides at its expense a marketplace without internal frontiers that inures to the benefit of all commercial enterprises that operate within the borders of THE EUROPEAN COMMUNITY. This marketplace makes the sale of products such as cigarettes easier and more profitable. The money-laundering and other wrongful activities of the RJR DEFENDANTS and their coconspirators make illicit use of this marketplace for their own economic benefit and to the economic detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. Money laundering and associated wrongdoing disrupt the legitimate trade and markets within THE EUROPEAN COMMUNITY, damage the economic viability of THE EUROPEAN COMMUNITY, and cause harm to the financial institutions and infrastructure within THE EUROPEAN COMMUNITY.

(i.) *Damage to the Legitimate Economy.* The RJR DEFENDANTS' money-laundering scheme and related criminal activities cause a direct and adverse economic impact on THE EUROPEAN COMMUNITY and the MEMBER STATES because this underground economy, in which the RJR DEFENDANTS and their coconspirators play a significant and material role, competes illegally against the legitimate economy of THE EUROPEAN

COMMUNITY and the MEMBER STATES, and thereby causes direct financial loss to the PLAINTIFFS.

(j.) *Damage to THE EUROPEAN COMMUNITY Financial Institutions.* The RJR DEFENDANTS' money-laundering scheme and related criminal activities undermine and damage THE EUROPEAN COMMUNITY'S financial system. The integrity of financial institutions, including banks, is compromised when they are used to launder criminal proceeds. Financial messaging systems such as the SWIFT system, based in Belgium, have been compromised because they have been used on a continuing basis to expedite this money-laundering scheme.

(k.) *Frustration of the Duty to Prevent Harm to Financial Institutions. The* RJR DEFENDANTS' money-laundering scheme and related criminal activities subvert and undermine THE EUROPEAN COMMUNITY'S duties, responsibilities, and legal authority, and specifically inhibit the ability of THE EUROPEAN COMMUNITY to prevent harm to the financial institutions and infrastructure within THE EUROPEAN COMMUNITY.

(l.) *Damage to MEMBER STATES (Bank Failures).* When commercial banks fail wholly or partially as a result of money laundering, the MEMBER STATES sustain direct economic losses because they are often required to protect depositors who are victims of these bank failures.

(m.) *Damage to MEMBER STATE Banks.* Money laundering associated with the cigarette sales described in this Complaint has a direct and adverse

impact on commercial banks owned wholly or partially by certain of the MEMBER STATES. The underground currency exchange and illegal barter transactions associated with money laundering deprive commercial banks of transaction fees and other sources of income associated with the international and/or foreign exchange transactions that are displaced by these money-laundering activities. When commercial banks fail as a result of money laundering, the MEMBER STATES sustain direct economic losses as a result of those failures.

(n.) *Protection of MEMBER STATES' Currency.* When each of the MEMBER STATES issues its currency, the MEMBER STATE acts as a guarantor of the stability of the currency it issues (see, however, the discussion of the Euro at paragraph (o.) below). The MEMBER STATE provides value to the currency by its willingness to maintain the strength and integrity of that currency. When the RJR DEFENDANTS and their coconspirators launder the currency of a MEMBER STATE, they convert and make illicit use of the currency and thereby erode the stability and credibility of that currency, depriving the PLAINTIFFS of money and property.

(o.) *Protection of the Euro.* On January 1, 1999, THE EUROPEAN COMMUNITY created a new currency, the Euro. It is the ultimate duty and responsibility of THE EUROPEAN COMMUNITY and the MEMBER STATES to protect the integrity of the Euro and the public's confidence in the Euro. When the RJR DEFENDANTS and their coconspirators launder the Euro, they convert and make illicit use of the Euro, thereby undermining the integrity of the Euro, as well as public confidence in

the Euro and in financial institutions that are based on the Euro.

(p.) *Devaluation of PLAINTIFFS' Property.* The money-laundering scheme of the RJR DEFENDANTS and their coconspirators involves the exchange of Euros and the currencies of the MEMBER STATES for U.S. dollars often at deeply discounted black-market exchange rates due to the criminal nature of these transactions. The exchange of tens of millions of dollars worth of the PLAINTIFFS' currencies at a deep discount rate acts to devalue the PLAINTIFFS' currencies. Because the PLAINTIFFS hold and own billions of dollars in their own currencies, the PLAINTIFFS suffer a direct loss of money and property when the money that they hold is thus devalued.

(q.) *Distortion of the Money Supply.* The process of laundering criminal proceeds through the purchase and sale of cigarettes involves the unrecorded and irregular physical removal of huge amounts of the Euro and local currency from the territory of the MEMBER STATES. The money-laundering activities of the RJR DEFENDANTS, when they involve an unrecorded and irregular removal of PLAINTIFFS' currencies, act to affect and distort the supply of money in the MEMBER STATES. This distortion directly and adversely affects the official calculations of the money supply performed and maintained by THE EUROPEAN COMMUNITY and the MEMBER STATES, thereby causing additional expenditures of funds by the PLAINTIFFS to detect and compensate for the huge unrecorded and irregular physical removals of PLAINTIFFS' currencies, depriving the PLAINTIFFS of money and property.

(r.) *Balance of Payments.* The process of laundering criminal proceeds through the purchase and sale of U.S.-made cigarettes involves the illegal conversion of Euros and local currency into U.S. dollars outside the facilities provided by THE EUROPEAN COMMUNITY and the MEMBER STATES for this exchange. The money-laundering activities of the RJR DEFENDANTS, when they involve an unrecorded and irregular conversion of the PLAINTIFFS' currencies into U.S. dollars, distort the official balance of payments calculated and maintained by the PLAINTIFFS, thereby causing additional expenditures of funds by the PLAINTIFFS to detect and compensate for the huge unrecorded and irregular foreign exchange operations, depriving the PLAINTIFFS of money and property.

(s.) Right, Title, and Interest in the Proceeds of Crime. Under the laws of the MEMBER STATES, the MEMBER STATES possess title in, or have a right to the proceeds of, any criminal activity infringing their interests. This right is a civil right of reparation. The RJR DEFENDANTS' and their coconspirators' schemes as described in this Complaint caused and continue to cause a loss of money and property to THE EUROPEAN COMMUNITY and the MEMBER STATES because, for example, the laundering of the criminal proceeds prevents the MEMBER STATES from collecting the money and property constituting the proceeds of criminal activity, to which right or title has vested in the MEMBER STATES.

(t.) Right, Title, and Interest in the Instrumentalities of Crime. Under the laws of the MEMBER STATES, the MEMBER STATES possess title in, or have a right to, any property used in the

commission of a crime infringing their interests, including money and goods and bribes paid to facilitate sales. This right is a civil right of reparation. The RJR DEFENDANTS' money laundering described in this Complaint, for example, causes a loss of business and property to the MEMBER STATES because the laundering of the criminal proceeds prevents the MEMBER STATES from acquiring title in or rights to the instrumentalities used in the commission of criminal activity, which title or right has vested in the MEMBER STATES.

(u.) *Money Laundering Facilitates Organized Crime.* The money-laundering scheme by the RJR DEFENDANTS facilitates organized crime including narcotics trafficking, arms trafficking, and other offenses. THE EUROPEAN COMMUNITY, the MEMBER STATES, and indeed, the United States, are harmed by such conduct. But for the active assistance of the RJR DEFENDANTS, money launderers and criminals could not have carried out and have laundered the proceeds of their criminal activities to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES.

(v.) *Costs of Fighting Money Laundering.* The RJR DEFENDANTS' money-laundering scheme and related criminal activities cause direct economic losses to THE EUROPEAN COMMUNITY and the MEMBER STATES in the form of increased expenditures to prevent money laundering, including financial audits, anti-money-laundering protocols, periodic meetings and conferences to address specifically RJR DEFENDANTS' conduct, and other expenditures that are necessitated by such conduct.

(w.) *Costs of Regulating Transactions and Detecting Money Laundering.* Financial institutions in THE EUROPEAN COMMUNITY must train staff in detecting and reporting suspicious transactions and in any event report all transactions over EUR 15,000 to the authorities in the MEMBER STATES. Specially constituted financial intelligence units ("FIU") must then quickly investigate the reported transactions as well as carrying out other investigations into money laundering. As a result, the MEMBER STATES have been injured in their business and property because of the costs to financial institutions of detecting and reporting such transactions and because of the funds and resources required for MEMBER STATES to carry out investigations in order to detect money laundering.

(x.) *Law-Enforcement Costs of Fighting Underlying Criminal Activity.* THE EUROPEAN COMMUNITY and the MEMBER STATES are required to expend large amounts of money on law-enforcement activities to combat the criminal activity that is facilitated by the money laundering and related activities of the RJR DEFENDANTS and their coconspirators. Such criminal activity includes, but is not limited to, narcotics trafficking, weapons trafficking, terrorism, and an array of other organized criminal activities. But for the money-laundering activities of the RJR DEFENDANTS, the efficacy of these crimes would be diminished, the incentive to commit these crimes would be reduced, and the law enforcement and other costs incurred by THE EUROPEAN COMMUNITY and the MEMBER STATES would be accordingly diminished.

(y.) *Damage to EUROPEAN COMMUNITY and MEMBER STATE Property.* The

means employed by the RJR DEFENDANTS and their coconspirators routinely result in damage to or the destruction of property of THE EUROPEAN COMMUNITY or the MEMBER STATES, such as automobiles and vessels. This damage to the PLAINTIFFS' property is foreseeable and anticipated by the RJR DEFENDANTS and their coconspirators, and results in additional expenditures by THE EUROPEAN COMMUNITY and MEMBER STATES to repair and replace the damaged property.

(z.) *Damage to MEMBER STATES for Expenses to Store and Destroy Proceeds of Criminal Activity.* As a result of the massive money-laundering scheme perpetrated by the RJR DEFENDANTS, the Italian Republic, for example, has been required to warehouse, store, and ultimately destroy huge volumes of cigarettes and other property used in the scheme. For example, at one storage facility alone, the Italian Republic was storing two million master cases of cigarettes that were purchased with the proceeds from crime. Often, such cigarettes must be stored for a long period of time because they will serve as evidence in legal actions. Accordingly, the average case of cigarettes seized by law-enforcement authorities in Italy remains in storage approximately six years. The cost to the Italian Republic for the storage of these cigarettes, including warehouse facilities, employees, insurance, and costs associated with the full-time process of destroying cigarettes equals approximately thirteen dollars per master case of cigarettes. Accordingly, the Italian Republic currently spends approximately twenty-six million dollars per year simply to warehouse, store, and destroy seized cigarettes. Of the cigarettes so stored, substantial

percentages are the products of the RJR DEFENDANTS. Other MEMBER STATES currently incur similar costs and resulting losses.

(aa.) *MEMBER STATES' Contributions to EUROPEAN COMMUNITY Expenditures.* The MEMBER STATES have suffered an injury to business and property because they have been required to contribute additional funding to THE EUROPEAN COMMUNITY as a result of the money-laundering activities of the RJR DEFENDANTS and their coconspirators.

(bb.) *MEMBER STATE Local Expenditures to Support EUROPEAN COMMUNITY Action.* The MEMBER STATES have suffered an injury to business and property because they have been required to expend additional funds and resources to support, on a local level, the additional efforts, activities, and expenditures of THE EUROPEAN COMMUNITY due to the money-laundering activities of the RJR DEFENDANTS and their coconspirators.

(cc.) *Distortion of the "Fourth Resource."* Huge volumes of irregular transactions have gone unrecorded due to the RJR DEFENDANTS' money-laundering scheme. This has produced distortions in the system of contributions made by the MEMBER STATES to THE EUROPEAN COMMUNITY. As a result, some MEMBER STATES have suffered injury to their business and property because they have been required to contribute more than their correct share of the "fourth resource." THE EUROPEAN COMMUNITY has been injured in its business and property because increased expenditures of funds and resources are required to detect and compensate for

the distortions produced in the fourth resource contribution assessments produced by the huge money-laundering transactions of the RJR DEFENDANTS and their coconspirators.

(dd.) *Frustration of THE EUROPEAN COMMUNITY'S Duty to Fulfill Its Obligations to the MEMBER STATES.* The money laundering and related criminal activities of the RJR DEFENDANTS and their coconspirators substantially inhibit the capacity of THE EUROPEAN COMMUNITY to execute its duties to regulate foreign commerce; to regulate customs territories, free-trade zones, and customs-bonded warehouses; to regulate transportation into THE EUROPEAN COMMUNITY or within its borders, including the use of the roads; to regulate the free movement of goods within THE EUROPEAN COMMUNITY; to regulate safety and security at sea; to combat money laundering; to protect and promote the economic well being of its citizens; and to abate harm to itself and to the general public within THE EUROPEAN COMMUNITY.

(ee.) *Damage to EUROPEAN COMMUNITY'S Regulation of its Customs Territory.* THE EUROPEAN COMMUNITY has a Customs Territory and a Customs Border separate and apart from the borders of the MEMBER STATES. The violation and permeation of that Border and that Territory by money-laundering activities and the illegal transport of money into and out of THE EUROPEAN COMMUNITY violates the legal rights of THE EUROPEAN COMMUNITY, threatens the safety, security, and well-being of governmental personnel and property within THE EUROPEAN COMMUNITY, and interferes with and damages the

regulatory system and authority of THE EUROPEAN COMMUNITY.

(ff.) *Damage to the MEMBER STATES Regarding Protection of Their Borders.* Each of the MEMBER STATES has a national territory and borders separate and apart from the borders of the other MEMBER STATES and THE EUROPEAN COMMUNITY. The violation and permeation of those borders and that national territory by money-laundering activities and the illegal transport of money into and out of the MEMBER STATES violates the legal rights of the MEMBER STATES, threatens the safety, security, and well-being of governmental personnel and property within the MEMBER STATES, and interferes with and damages the regulatory system and authority of the MEMBER STATES. The MEMBER STATES suffer injury to their money and property from the additional expenditures required to counteract the scheme of the RJR DEFENDANTS and their coconspirators through additional equipment, personnel, border facilities, and other means.

(gg.) *Injury to THE EUROPEAN COMMUNITY and MEMBER STATES Due to RJR DEFENDANTS' Support of Totalitarian Regimes and Terrorist Groups.* Illegal cigarette sales by the RJR DEFENDANTS and their coconspirators into Iraq and other areas resulted in direct financial benefits to totalitarian regimes and to terrorist groups that have caused harm to THE EUROPEAN COMMUNITY and to the MEMBER STATES, including but not limited to destruction of public property, death and/or injury of government personnel, diminished economic productivity,

increased law-enforcement expenses, and other costs associated with combating terrorism.

(hh.) *Damage Caused by Bribery of Public Officials.* Money-laundering activities, bribery of government officials, and other related criminal acts conducted in various countries, have caused severe harm to THE EUROPEAN COMMUNITY and the MEMBER STATES, including but not limited to increased law-enforcement and military expenditures, disruption of public services, expenses to stabilize unstable political situations in Eastern Europe that affect Western Europe, and damage to the trade and the economy of THE EUROPEAN COMMUNITY and the MEMBER STATES.

(ii.) *Expenses and costs incurred to address, remedy, and repair the effects of the RJR DEFENDANTS' money laundering.* The EUROPEAN COMMUNITY and MEMBER STATES have been injured in their business and property because they have been required to incur expenses and costs to address and remedy the money-laundering activities of the RJR DEFENDANTS and the effects thereof. The PLAINTIFFS have suffered economic losses and other damages as a result of the need to address and remedy the money laundering conducted by the RJR DEFENDANTS and the effects thereof. The PLAINTIFFS are entitled to restitution and reimbursement for such losses and damages.

(jj.) *Customs Duties and Taxes.* As a result of the activities of the RJR DEFENDANTS, large amounts of cigarettes have been introduced into THE EUROPEAN COMMUNITY, and the proper duties and taxes have not been paid on the aforesaid cigarettes. As a result of the RJR DEFENDANTS'

wrongful activities, the PLAINTIFFS, THE EUROPEAN COMMUNITY, and the MEMBER SATES, have been deprived of the money and property that they would have obtained from the lawful importation and sale of cigarettes, and RJR DEFENDANTS have secured vast profits and proceeds from their illegal scheme. This money and property includes, but is not limited to the following:

(i.) Customs duties that are levied exclusively for the benefit of THE EUROPEAN COMMUNITY. A portion of said customs duties is retained by the MEMBER STATES pursuant to the own resources decisions of THE EUROPEAN COMMUNITY as ratified by all the MEMBER STATES.

(ii.) Value-added tax levied on cigarettes. This tax is shared between THE EUROPEAN COMMUNITY and its MEMBER STATES.

(iii.) Excise taxes that would have been paid on the cigarettes in question absent the wrongful activities of the RJR DEFENDANTS and their coconspirators.

(iv.) The RJR DEFENDANTS' schemes also harmed THE EUROPEAN COMMUNITY and the MEMBER STATES by supplanting sales of lawfully sold cigarettes on which duties, money, and taxes would have been paid to THE EUROPEAN COMMUNITY and its MEMBER STATES.

147. THE EUROPEAN COMMUNITY and the MEMBER STATES and their economies have suffered losses at least equal to, and properly measured by, the total amount of criminal proceeds

laundered by the RJR DEFENDANTS. These losses were directly and proximately caused by the money-laundering activities of the RJR DEFENDANTS and their coconspirators. THE EUROPEAN COMMUNITY and the MEMBER STATES have the duty and responsibility to protect against, and to seek redress for, such losses.

148. As a direct and proximate result of the money-laundering activities that are conducted, aided, and encouraged by the RJR DEFENDANTS, losses of hundreds of millions of dollars per year are being suffered by THE EUROPEAN COMMUNITY and its MEMBER STATES, including the Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cyprus, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden. THE EUROPEAN COMMUNITY and the MEMBER STATES have been deprived of money and property in this manner throughout the 1990s and continuing through the present time. If the money-laundering activities of the RJR DEFENDANTS are not stopped, THE EUROPEAN COMMUNITY and the MEMBER STATES will continue to lose money and property in the future. In addition, THE EUROPEAN COMMUNITY and the MEMBER STATES have been required to expend large amounts of money in their efforts to stop money laundering and to recoup funds

that they have lost as a result of the activities of the RJR DEFENDANTS.

Restitution

149. Restitution at law is available as an alternative remedy to compensatory damages where, as here, a defendant has engaged in deliberate wrongdoing. Under this restitutionary remedy, a defendant who is consciously tortious in acquiring a benefit is deprived of any profit derived from his wrongful action. Plaintiffs hereby seek the legal remedy of restitution, as an alternative remedy to compensatory damages, in order to assure that the most effective and manageable remedy is available to Plaintiffs, and to deter deliberate and wrongful conduct that has conferred illicit profits upon the RJR DEFENDANTS. In connection with Plaintiffs' request for restitution at law, Plaintiffs seek all appropriate ancillary relief, including without limitation an accounting of profits and/or the appointment of a receiver to assist in the determination of the restitution claim.

Punitive Damages

150. The organized crime and money-laundering activities undertaken and facilitated by the RJR DEFENDANTS and their coconspirators were performed in a wanton, reckless, and/or malicious manner. In light of the nature and reprehensibility of the RJR DEFENDANTS' and their coconspirators' conduct; the actual or tacit approval of such illicit conduct by senior management of the RJR DEFENDANTS; the actual and potential harm to the public and PLAINTIFFS caused by such conduct; and the financial benefits that accrued to the RJR DEFENDANTS as a result of

such conduct, punitive damages can and should be assessed in an amount to be determined.

Declaratory Relief

151. Pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, Plaintiffs are entitled to a declaration of the rights and other legal relations between the parties since a case of actual controversy exists. The Federal Declaratory Judgment Act is intended to promote clarification of the legal relations at issue and afford prompt relief from uncertainty and insecurity.

Injunctive and Other Equitable Relief

152. All of the losses described above will continue into the future, absent judgment in Plaintiffs' favor and injunctive and equitable relief, including:

RICO Equitable & Injunctive Relief.

153. Under the RICO statute, 18 U.S.C. § 1964(a), and pursuant to inherent equitable powers of the Court, the U.S. District Court is empowered to prevent and restrain violations of 18 U.S.C. § 1962 by issuing appropriate orders, including without limitation: (i) ordering any person to divest himself or herself of any interest, direct or indirect, in any enterprise; (ii) imposing reasonable restrictions on the future activities or investments of any person that affect interstate or foreign commerce, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in; and (iii) ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons. In addition, under 28 U.S.C. § 1651(a), the U.S. District Courts are empowered to "issue all writs necessary or

appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Consistent with these powers, the PLAINTIFFS seek an order that:

(a.) compels each of the RJR DEFENDANTS that is found to have violated the relevant common-law, statutory, or equitable standard to disgorge all proceeds derived from any such violation and to make restitution to Plaintiffs;

(b.) imposes a constructive trust and equitable lien upon the RJR DEFENDANTS' ill-gotten gains, including without limitation those profits and proceeds derived from the transactions with organized crime networks and the money-laundering scheme, and compels the RJR DEFENDANTS to disgorge to Plaintiffs all ill-gotten gains derived from such schemes;

(c.) orders the imposition of a constructive trust and equitable lien upon all monies laundered by the RJR DEFENDANTS as a part of the money-laundering scheme and compels the RJR DEFENDANTS to disgorge to Plaintiffs an amount equal to the total amount of monies laundered through the aforesaid scheme;

(d.) orders divestiture of all interests held by the RJR DEFENDANTS, directly or indirectly, in the enterprises involved in the organized crime and money-laundering activities;

(e.) orders divestiture of REYNOLDS AMERICAN INC.'S interest in the ORIGINAL RJR DEFENDANTS;

(f.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with

them, from laundering the proceeds of criminal activities through the sale of cigarettes or otherwise engaging in conduct that violates any common-law, statutory, or equitable standard;

(g.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from selling cigarettes without proper documentation, shipping records, markings, and similar indicia of compliance with law that would allow the proper tracking of the cigarettes and the funds with which they were purchased so that they cannot be sold illegally;

(h.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from selling cigarettes to any distributor or any other person who cannot fully and accurately account for where the cigarettes will ultimately be sold;

(i.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from engaging in any practices by which distributors, shippers, or wholesalers can purchase cigarettes by making payments to offshore corporations, offshore bank accounts, or other locations that limit the ability of government officials to track the sale of cigarettes or the payment for said cigarettes;

(j.) orders the RJR DEFENDANTS to create and utilize adequate protocols by which all cigarettes manufactured by the RJR DEFENDANTS and all payments made for such cigarettes into THE EUROPEAN COMMUNITY can be adequately

tracked and monitored by governmental officials of THE EUROPEAN COMMUNITY and the MEMBER STATES;

(k.) orders the RJR DEFENDANTS to take all reasonable and necessary steps to terminate ongoing money laundering and prevent future money laundering, including the adoption of any necessary labeling, tracking devices, or other means that would allow the RJR DEFENDANTS and/or THE EUROPEAN COMMUNITY and the MEMBER STATES to track and monitor the movement of cigarettes into and within THE EUROPEAN COMMUNITY;

(l.) orders the RJR DEFENDANTS to disclose all knowledge within their possession concerning the names, locations, activities, and procedures of their non-legitimate customers;

(m.) orders the RJR DEFENDANTS to implement "know-your-customer" protocols and rules for the acceptance of payments for their products that make it difficult or impossible for criminals to launder criminal proceeds through the purchase of DEFENDANTS' products;

(n.) orders the RJR DEFENDANTS to adopt, monitor, and enforce appropriate compliance programs to deter and remedy money-laundering activities involving their products;

(o.) orders the RJR DEFENDANTS to abate and prevent conduct that facilitates the misuse of the ports and transportation facilities of the EC and MEMBER STATES, and/or disrupts the marketplace, by their employees and agents engaged in the illegal distribution of tobacco products and the laundering of the proceeds of crime.

154. For purposes of this complaint, all of the foregoing injunctive and equitable remedies and those injunctive and equitable remedies that may hereafter be sought by THE EUROPEAN COMMUNITY and the MEMBER STATES or ordered by the Court with respect to THE EUROPEAN COMMUNITY'S and the MEMBER STATES' claims under RICO shall be referred to as "RICO Equitable & Injunctive Relief."

Common-Law Equitable & Injunctive Relief.

155. Under the state and federal common law, and pursuant to the inherent equitable powers of the Court, the U.S. District Court is empowered to prevent and restrain the RJR DEFENDANTS' and their coconspirators' money-laundering activities, enter prohibitory and mandatory injunctions, and impose other equitable relief, to provide full relief to Plaintiffs and to prevent continuing harm to the Plaintiffs' interests. In addition, the federal courts are empowered under 28 U.S.C. § 1651(a) to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Consistent with these powers, THE EUROPEAN COMMUNITY and the MEMBER STATES seek an order that:

(a.) compels each of the RJR DEFENDANTS that is found to have violated a relevant common-law, statutory, or equitable standard to disgorge all proceeds derived from any such violation and to make restitution to Plaintiffs;

(b.) imposes a constructive trust and equitable lien upon the RJR DEFENDANTS' ill-gotten gains, including without limitation those profits and proceeds derived from the transactions

with organized crime networks and the money-laundering scheme, and compels the DEFENDANTS to disgorge to Plaintiffs all ill-gotten gains derived from such schemes;

(c.) orders the imposition of a constructive trust and equitable lien upon all monies laundered by the RJR DEFENDANTS as a part of the money-laundering scheme and compels the RJR DEFENDANTS to disgorge to Plaintiffs an amount equal to the total amount of monies laundered through the aforesaid scheme;

(d.) orders divestiture of REYNOLDS AMERICAN INC.'S interest in the ORIGINAL RJR DEFENDANTS;

(e.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them, from laundering the proceeds of criminal activities through the sale of cigarettes or otherwise engaging in conduct that violates any common-law, statutory, or equitable standard;

(f.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from selling cigarettes without proper documentation, shipping records, markings, and similar indicia of compliance with law that would allow the proper tracking of the cigarettes and the funds with which they were purchased so that they cannot be sold illegally;

(g.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from selling cigarettes to any distributor or any

other person who cannot fully and accurately account for where the cigarettes will ultimately be sold;

(h.) enjoins the RJR DEFENDANTS and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them from engaging in any practices by which distributors, shippers, or wholesalers can purchase cigarettes by making payments to offshore corporations, offshore bank accounts, or other locations that limit the ability of government officials to track the sale of cigarettes or the payment for said cigarettes;

(i.) orders the RJR DEFENDANTS to create and utilize adequate protocols by which all cigarettes manufactured by the RJR DEFENDANTS and all payments made for such cigarettes into THE EUROPEAN COMMUNITY can be adequately tracked and monitored by governmental officials of THE EUROPEAN COMMUNITY and the MEMBER STATES;

(j.) orders the RJR DEFENDANTS to take all reasonable and necessary steps to terminate ongoing money laundering and prevent future money laundering, including the adoption of any necessary labeling, tracking devices, or other means that would allow the DEFENDANTS and/or THE EUROPEAN COMMUNITY and the MEMBER STATES to track and monitor the movement of cigarettes into and within THE EUROPEAN COMMUNITY;

(k.) orders the RJR DEFENDANTS to disclose all knowledge within their possession concerning the names, locations, activities, and procedures of their non-legitimate customers;

(l.) orders the RJR DEFENDANTS to implement "know-your-customer" protocols and rules for the acceptance of payments for their products that make it difficult or impossible for criminals to launder criminal proceeds through the purchase of RJR DEFENDANTS' products;

(m.) orders the RJR DEFENDANTS to adopt, monitor, and enforce appropriate compliance programs to deter and remedy money-laundering activities involving their products; and

(n.) orders the RJR DEFENDANTS to abate and prevent conduct that facilitates the misuse of the ports and transportation facilities of the EC and MEMBER STATES, and/or disrupts the marketplace, by their employees and agents engaged in the illegal distribution of tobacco products and the laundering of the proceeds of crime.

156. For purposes of this complaint, all of the foregoing injunctive and equitable remedies, and those injunctive and equitable remedies that may hereafter be sought by Plaintiffs or ordered by the Court on Plaintiffs' state and federal common-law claims, shall be referred to as "Common-Law Equitable & Injunctive Relief."

COUNT I
MEMBER STATES
(AS TO ALL RJR DEFENDANTS)
(RICO, 18 U.S.C. § 1962(a))

157. The MEMBER STATES restate and reallege paragraphs one (1) through one hundred fifty-six (156) and further allege:

158. The RJR DEFENDANTS, along with their coconspirators in the money-laundering

schemes, including associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants in the schemes identified above, were, at relevant times, an association-in-fact of individuals and corporations engaged in, and the activities of which affected, interstate and foreign commerce, and thus constituted an "enterprise" within the meaning of 18 U.S. C. § 1961(4) (the "RJR Money-Laundering Enterprise"). These persons and entities were and are associated in fact for the purpose, among others, of illegally laundering criminal proceeds of criminal activity to the economic detriment of Plaintiffs. The RJR Money-Laundering Enterprise is an ongoing organization whose constituent elements function as a continuing unit for the common purpose of maximizing the sale of tobacco products through illegal means and carrying out other elements of the RJR DEFENDANTS' scheme. The RJR Money-Laundering Enterprise has an ascertainable structure and purpose beyond the scope of the RJR DEFENDANTS' predicate acts and the conspiracy to commit such acts. The Enterprise has engaged in and its activities have affected interstate and foreign commerce. The Enterprise continues through the concerted activities of the RJR DEFENDANTS to disguise the nature of the wrongdoing, to conceal the proceeds thereof, and to conceal the RJR DEFENDANTS' participation in the Enterprise in order to avoid and/or minimize their exposure to criminal and civil penalties and damages. The role of each DEFENDANT in the RJR Money-Laundering Enterprise has been set forth above.

159. In connection with the fraudulent schemes set forth above, and to further their illegal aims, the RJR DEFENDANTS have engaged in

numerous acts of "racketeering activity," and each of the RJR DEFENDANTS has aided and abetted each other of the RJR DEFENDANTS and other coconspirators in committing those acts of "racketeering activity" within the meaning of RICO. 18 U.S.C. §§ 1961, et seq.; 18 U.S.C. § 2. The RJR DEFENDANTS have committed multiple predicate acts of racketeering including, but not limited to:

(a.) Money Laundering. (18 U.S.C. §§ 1956(a)(l), 1961(1)(B)). Knowing that the property involved in certain financial transactions represented the proceeds of some form of unlawful activity, the RJR DEFENDANTS conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; or did so knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source of ownership, or the control of the proceeds of specified unlawful activity, or did so knowing that the transactions were designed in whole or in part to avoid a transaction-reporting requirement under state or federal law. The RJR DEFENDANTS knew that the funds they received in exchange for cigarettes in the manners set forth in this Complaint represented the proceeds of specified unlawful activity, including without limitation narcotics trafficking, wire fraud, mail fraud, and violations of the Travel Act. The RJR DEFENDANTS also knew that such transactions constituted offenses against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance. The RJR DEFENDANTS knowingly conducted and attempted

to conduct such financial transactions with the intent to promote the carrying on of such unlawful activity. In addition, the RJR DEFENDANTS knowingly conducted and attempted to conduct such financial transactions with the intent to conceal or disguise the nature (proceeds of racketeering activity), the location, the source (drug traffickers, money launderers), the ownership, and/or the control of the proceeds of specified unlawful activity. Finally, the RJR DEFENDANTS knowingly conducted and attempted to conduct such financial transactions to avoid transaction-reporting requirements under state or federal law, including without limitation currency and monetary instrument reports.

(b.) International Money Laundering. (18 U.S.C. §§ 1956(a)(2), 1961(1)(B)). The RJR DEFENDANTS transported, transmitted, and/or transferred monetary instruments or funds to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity, or did so knowing that the monetary instruments or funds involved in the transportation, transmission, or transfer represented the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of a specified unlawful activity, or to avoid a transaction-reporting requirement under state or federal law. By such conduct, the RJR DEFENDANTS engaged in financial transactions within the meaning of 18 U.S.C. § 1956(c)(4). Among other things, the RJR DEFENDANTS knew that money orders and funds sent from South America,

the Caribbean, and Europe to the United States to pay for cigarettes purchased in bulk represented the proceeds of specified unlawful activity, including without limitation wire fraud, mail fraud, and violations of the Travel Act. The RJR DEFENDANTS also knew that such specified unlawful activity was an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance. The RJR DEFENDANTS also aided and abetted violations of 18 U.S.C. § 1956(a)(l) and § 1956(a)(2).

(c.) Conspiracy to Engage in Money Laundering. 18 U.S.C. §§ 1956(h), 1961(1)). The RJR DEFENDANTS conspired to commit offenses defined in 18 U.S.C. § 1956 — including § 1956(a)(l) and § 1956(a)(2). The RJR DEFENDANTS, by their words and actions, agreed to accept currency, monetary instruments, and funds with the knowledge that the currency, monetary instruments, and funds represented the proceeds of specified unlawful activity conducted by themselves and their coconspirators. The RJR DEFENDANTS adopted the common purpose of the conspiracy and participated in its consummation. The goal of the money-laundering conspiracy was to deprive Plaintiffs of money and property, while assuring that the profits derived from cigarette sales were repatriated to the benefit of the RJR DEFENDANTS in a clandestine manner to avoid detection and prosecution.

(d.) Money Laundering (18 U.S.C. §§ 1957, 1961(1)). DEFENDANTS knowingly engaged or attempted to engage in monetary transactions in the United States, in criminally derived property having a value greater than $10,000 and derived from specified unlawful activity. 18 U.S.C. § 1957(f)(3)

and § 1956(c)(7). DEFENDANTS engaged in monetary transactions, including deposits, withdrawals, transfers, or exchanges, in or affecting interstate or foreign commerce, involving funds or monetary instruments by, through, or to financial institutions. DEFENDANTS knew that the funds or instruments received in exchange for their cigarettes represented the proceeds of specified unlawful activity, including but not limited to, wire fraud, mail fraud, and violations of the Travel Act. The RJR DEFENDANTS knew that such specified unlawful activity included offenses against foreign nations involving the manufacture, importation, sale, or distribution of controlled substances.

(e.) Money Laundering of Proceeds of Offenses against Foreign Nations. (18 U.S.C. § 1956(c)(7)(B)(vi); 18 U.S.C. § 1961(1)(B)). The RJR DEFENDANTS, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; or did so knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or did so knowing that the transactions were designed in whole or in part to avoid transaction-reporting requirements under state or federal law. The RJR DEFENDANTS knew that the proceeds of transactions with narcotics traffickers, participants in organized crime, money launderers, and others engaged in criminal conduct represented the proceeds

of specified unlawful activity, including without limitation offenses with respect to which the United States would be obligated by a multilateral treaty either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States. Specifically, the RJR DEFENDANTS laundered the proceeds of offenses that are subject to multilateral treaties, including without limitation the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), and the International Convention for the Suppression of the Financing of Terrorism (2001), and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted November 21, 1997, entered into force in the United States February 15, 1999).

(i.) The RJR DEFENDANTS have laundered the proceeds of various offenses covered by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, including, for example: (i) the conversion or transfer of property, knowing that such property is derived from narcotics trafficking, or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting persons involved in the commission of such an offense or offenses to evade the legal consequences of their actions; (ii) the financing of narcotics trafficking; (iii) the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from narcotics trafficking or from an act of participation in such an offense or offenses;

(iv) the acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from narcotics trafficking or from an act of participation in such offense or offenses; and (v) participation in, association or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating, and concealing the commission of acts of narcotics trafficking.

(ii.) The DEFENDANTS have laundered the proceeds of various offenses covered by the International Convention for the Suppression of the Financing of Terrorism (2001), including, for example, providing material support and resources to persons and entities engaged in terrorist activities, and providing assets, including products and services, to those persons and entities, acting with knowledge that such persons and entities, including without limitation the PKK and the former Iraqi regime, were engaged in terrorism or the sponsorship of terrorist activities. Such persons and entities that engage in terrorist activity are so tainted by their criminal conduct that providing any assets, material support, or resources to any of them facilitates such terrorist activities.

(iii.) The DEFENDANTS have laundered, and conspired to launder, the proceeds of various offenses covered by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (adopted November 21, 1997, entered into force in the United States February 15, 1999), including for example the proceeds of transactions obtained or continued as a consequence of payments, direct and indirect, to foreign public officials. As alleged above, DEFENDANTS made payments or provided things of

value to foreign public officials, retained or obtained business as a result of such payments, and laundered the proceeds of those transactions, often through venues known for bank secrecy.

(f.) Money Laundering of Proceeds of Terrorism. (18 U.S.C. § 1956(c)(7)(D); 18 U.S.C. § 1961(1)(B); 18 U.S.C. § 1961(1)(G)). The RJR DEFENDANTS, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; or did so knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or did so knowing that the transaction was designed in whole or in part to avoid a transaction-reporting requirement under state or federal law. DEFENDANTS knew that the proceeds of transactions with persons and entities engaged in terrorism represented the proceeds of specified unlawful activity, including but not limited to acts of terrorism.

(g.) Money Laundering of Proceeds of Offenses Against a Foreign Nation Involving Narcotics Trafficking. (18 U.S.C. § 1956(c)(7)(B); 18 U.S.C. § 1961(1)(B)). Knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, the RJR DEFENDANTS conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified

unlawful activity with the intent to promote the carrying on of specified unlawful activity; or did so knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or did so knowing that the transaction was designed in whole or in part to avoid transaction-reporting requirements under state or federal law. The RJR DEFENDANTS knew that the proceeds of transactions with narcotics traffickers, money launderers, and others engaged in criminal activity represented the proceeds of specified unlawful activity, including an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance.

(h.) Money Laundering of Proceeds of Offenses Against a Foreign Nation Involving a Scheme to Defraud Foreign Banks. (18 U.S.C. § 1956(c)(7)(B)(iii); 18 U.S.C. § 1961(1)(B)). The DEFENDANTS, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; or, knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source of ownership, or the control of the proceeds of specified unlawful activity, or knowing that the transaction was designed in whole or in part to avoid a transaction-reporting requirement under state or federal law. DEFENDANTS engaged in and facilitated financial

transactions and acts of money laundering that deprived foreign banks, including those belonging to Plaintiffs, of money and property that would have been paid to such banks through the lawful transaction of business. DEFENDANTS knowingly engaged in financial transactions designed to launder the proceeds of fraud, or a scheme or attempt to defraud, foreign banks belonging to Plaintiffs.

(i.) Money Laundering of Proceeds of Violations of Foreign Corrupt Practices Act. (18 U.S.C. § 1956(c)(7)(D); 18 U.S.C. § 1961(1)(B)). In general, the Foreign Corrupt Practices Act (FCPA) makes it unlawful for DEFENDANTS, or any officer, director, employee, or agent thereof, to pay or promise to pay money or any thing of value to any foreign official for purposes of influencing any act or decision of the foreign official in his or her official capacity, inducing such official to do or omit to do any act in violation of the lawful duty of such official, or securing any improper advantage, or inducing such foreign official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist DEFENDANTS in obtaining or retaining business for or with, or directing business to, any person. "Foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of such entities.

The DEFENDANTS, acting through intermediaries, provided money or things of value to foreign officials to obstruct oversight of DEFENDANTS' conduct, preclude discovery of their

involvement in money laundering and other criminality, and thereby permit their business to continue. The DEFENDANTS, knowing that the property involved in a financial transaction represented the proceeds of some form of unlawful activity, conducted or attempted to conduct financial transactions in interstate and foreign commerce involving the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity; or, knowing that the transaction was designed in whole or in part to conceal or disguise the nature, the location, the source of ownership, or the control of the proceeds of specified unlawful activity, or knowing that the transaction was designed in whole or in part to avoid a transaction-reporting requirement under state or federal law.

(j.) Providing Material Support or Resources to Designated Foreign Terrorist Organizations. (18 U.S.C. § 2339(B) and 18 U.S.C. § 1961(1)(G)). As from June 1999 and continuing until at least 2002 in the United States and elsewhere, the RJR DEFENDANTS and their agents with each other and with others known and unknown, did knowingly provide, conspire to provide, and aid and abet others in providing, material support or resources to the PKK, a designated FTO, in violation of 18 U.S.C. § 2339(B). The object of the conspiracy was to provide funds, goods, services, and other assets to the PKK, which caused the DEFENDANTS' cigarette shipments to be sent into Iraq and financed the PKK's terrorist activities and operations.

(k.) Wire fraud and mail fraud. (18 U.S.C. §§ 1341, 1343, 1961(1)(B)). The RJR DEFENDANTS devised a scheme or artifice to defraud and/or to

obtain money by means of false pretenses, representations, or promises, and used the mails and wires for the purpose of executing the scheme, and acted with a specific intent to defraud by devising, participating in, and/or abetting the scheme. The wire and mail communications were made during the course of the conspiracy that covered at least 2002 through 2009. Hundreds of telephone conversations and faxes were made to further the fraudulent scheme on virtually a daily basis during the course of the conspiracy, including without limitation those identified in paragraphs 53, 66, 75-79, 104-108, 109-111, 112-113, and others. These telephone conversations, mailings, and wire transfer of funds furthered the scheme by expediting the secret payments to the RJR DEFENDANTS of funds that constituted the proceeds of criminal activity and were part of a clandestine system for the remittance of such proceeds to the RJR DEFENDANTS. The RJR DEFENDANTS, acting through their employees, agents, and coconspirators, made or caused to be made such telephone calls, mailings, and wire transfers of funds to further the scheme. The RJR DEFENDANTS knew that their coconspirators, in the course of carrying out the RJR DEFENDANTS' directions and orders, would use or cause to be used the interstate and international wires and mails. The motive for committing fraud is plain: the acquisition of criminals as additional customers by laundering their criminal proceeds meant increased profits and market share for the RJR DEFENDANTS.

(l.) Violation of the Travel Act. (18 U.S.C. §§ 1952, 1961(1)(B)). The RJR DEFENDANTS traveled in interstate or foreign commerce, and used facilities in interstate and foreign commerce,

including the mail, with intent to distribute the proceeds of unlawful activity, and to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of unlawful activity, and thereafter performed or attempted to perform unlawful activity. The RJR DEFENDANTS knew that the funds provided to them represented the proceeds of unlawful activity, including trafficking in narcotics and controlled substances, and knew that, by accepting such payments, they aided the efforts of the drug traffickers to launder their ill-gotten gains. The RJR DEFENDANTS and their representatives and coconspirators traveled across national borders and otherwise used the facilities of foreign commerce to distribute the proceeds of unlawful activity to the benefit of the RJR DEFENDANTS. By this conduct, the RJR DEFENDANTS promoted, managed, established, and facilitated such unlawful activity.

160. The acts described above form a "pattern" of racketeering activity within 18 U.S.C. § 1961(5). The DEFENDANTS and others with whom they have been associated have been related in their common objectives of maximizing global cigarette sales and utilizing money laundering to achieve this end. The DEFENDANTS' predicate acts have had the same or similar purposes, results, participants, victims, and methods of commission, and occurred over at least a six-year period. The predicate acts have been consistently repeated and are capable of further repetition.

161. The DEFENDANTS' pattern of racketeering activities dates from at least January 1, 2002, through the present and threatens to continue in the future.

162. The RJR DEFENDANTS used or invested, directly or indirectly, racketeering income, or a part thereof, or the proceeds of such income, to acquire an interest in, establish, and operate, the RJR Money-Laundering Enterprise, which is and was engaged in, or the activities of which affect and have affected, interstate or foreign commerce, in violation of 18 U.S.C. § 1962(a). The RJR DEFENDANTS were principals in the racketeering scheme. The MEMBER STATES suffered multiple injuries to their economic interests as a result of this use and investment of racketeering income.

163. Specifically, the RJR DEFENDANTS received the income and proceeds of a pattern of racketeering activity in which they participated as principals, including an international money-laundering scheme, acts of wire fraud and mail fraud, and violations of the Travel Act. Upon their receipt of such ill-gotten gains by wire transfers from money launderers and/or their associates, the RJR DEFENDANTS used and invested such income and proceeds, or a portion thereof, to acquire an interest in, establish, and operate the RJR Money-Laundering Enterprise, which was and is engaged in interstate and foreign commerce. In particular, the RJR DEFENDANTS used the proceeds of the scheme: (a) to operate the RJR Money-Laundering Enterprise; (b) to replenish the supply of cigarettes for ultimate sale to known money launderers; (c) to acquire, purchase, and subsidize facilities necessary to the RJR Money-Laundering Enterprise, including sales, distribution, and manufacturing operations (e.g., its Puerto Rico plant), secret offices, and offshore companies and bank accounts; (d) to compensate employees and agents of the RJR DEFENDANTS engaged in the

money-laundering activities; (e) to pay expenses incurred in connection with money-laundering activities such as telephone bills incurred in the wire-fraud scheme and travel costs incurred by such employees; and (f) to establish a money-laundering scheme, infrastructure, and network. In sum, the RJR DEFENDANTS did not reinvest the proceeds of racketeering activity in their general business operations, but instead used and invested such proceeds to establish the infrastructure of, acquire an interest in, and operate the RJR Money-Laundering Enterprise, and it was this use and investment that harmed the MEMBER STATES. The use and investment of the proceeds of racketeering activity occurred in several ways, including but not limited to the following:

(a.) The proceeds from the money-laundering enterprise finance the unlawful sales and marketing operations that promote the increase of sales in succeeding years.

(b.) The increased market volume and premium prices charged to money-laundering customers are utilized to offset the additional expenses incurred by the DEFENDANTS when they pay for the additional shipping and handling charges associated with the clandestine movement of the cigarettes through the circuitous routes established by the DEFENDANTS.

(c.) The RJR DEFENDANTS built up and fostered clandestine relationships with money brokers and money-laundering organizations throughout the world, including THE EUROPEAN COMMUNITY and the MEMBER STATES, which solidified and strengthened those brokers and

organizations and enabled them to engage in other criminal conduct.

164. The MEMBER STATES were injured in their business and property by reason of the RJR DEFENDANTS' use and investment of racketeering income to acquire, establish, and operate the RJR Money-Laundering Enterprise. Absent this use and investment of racketeering income, the criminals who launder their criminal proceeds through the purchase of cigarettes would find their crimes less profitable and more difficult to commit, and the economic injury to the MEMBER STATES would have been avoided in whole or in part.

165. As a direct and proximate result of the violations set forth above, the Plaintiffs, the MEMBER STATES, have been injured in their business and property as set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). The DEFENDANTS' violations of 18 U.S.C. § 1962(a) caused these losses. Under the provisions of 18 U.S.C. § 1964(c), the MEMBER STATES are entitled to bring this action and recover herein treble damages, the costs of bringing the suit, pre-judgment interest, and reasonable attorneys' fees. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT II

MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(RICO, 18 U.S.C. § 1962(b))

166. The MEMBER STATES restate and reallege paragraphs one (1) through one hundred sixty-five (165) and further allege:

167. The RJR DEFENDANTS acquired or maintained, directly or indirectly, through a pattern of racketeering activity, an interest in and control of the RJR Money- Laundering Enterprise, which was and is engaged in, or the activities of which affect and have affected, interstate or foreign commerce in violation of 18 U.S.C. § 1962(b). The Plaintiffs, the MEMBER STATES, have been injured by the DEFENDANTS' acquisition and maintenance of an interest in and control of the enterprise through a pattern of racketeering activity.

168. The DEFENDANTS, through a pattern of racketeering activity, acquired or maintained, directly or indirectly, an interest in and control of the RJR Money-Laundering Enterprise that engaged in the activities which affect interstate and foreign commerce. Specifically, the RJR DEFENDANTS maintained control of the RJR Money-Laundering Enterprise by means of racketeering activities, including, for example: (a) interstate and international wire communications in violation of 18 U.S.C. § 1343 (orders and instructions for payment were placed telephonically and RJR had total control over the enterprise and the payment for their product); (b) money laundering in violation of 18 U.S.C. §§ 1956 and 1957 (RJR controlled and concealed the flow of the proceeds of the cigarette sales — a key aim of the scheme — through money laundering); and (c) violations of the Travel Act, 18 U.S.C. § 1952 (cross-border travel and transactions to facilitate money laundering and other illicit activities). Through this pattern of racketeering activities, which also included transmitting false statements to government authorities, the RJR DEFENDANTS were able to acquire and maintain an

interest in and control of the RJR Money-Laundering Enterprise. This interest and control furthered, concealed, and protected the operations of the money-laundering enterprise, and thereby permitted the RJR Money-Laundering Enterprise to flourish without detection.

169. As a direct and proximate result of the DEFENDANTS' acquisition and maintenance of an interest in and control of the RJR Money-Laundering Enterprise, the Plaintiffs, the MEMBER STATES, have suffered the loss of money and property as set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). The DEFENDANTS' violations of 18 U.S.C. § 1962(b) caused these losses. Under the provisions of 18 U.S.C. § 1964(c), the MEMBER STATES are entitled to bring this action and recover herein treble damages, the costs of bringing the suit, pre-judgment interest, and reasonable attorneys' fees. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT III

MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (RICO, 18 U.S.C. § 1962(c))

170. The MEMBER STATES restate and reallege paragraphs one (1) through one hundred sixty-nine (169) and further allege.

171. The RJR DEFENDANTS, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly participated in the operation or management of the

RJR Money-Laundering Enterprise, the activities of which affect interstate or foreign commerce.

172. At all relevant times, the RJR DEFENDANTS participated in the operation or management of an "enterprise," within the meaning of 18 U.S.C. § 1961(4). The RJR DEFENDANTS, operating together and individually, directed and controlled the RJR Money-Laundering Enterprise. The RJR DEFENDANTS operated, managed, and exercised control over the money-laundering enterprise by, among other things: (a) establishing a money-laundering scheme in which the coconspirators facilitated the money-laundering scheme and concealed and remitted to the RJR DEFENDANTS the proceeds of the money-laundering scheme; (b) compelling their customers to sell cigarettes at prices set by the RJR DEFENDANTS; and (c) investing and using the proceeds of the money-laundering scheme in the enterprise.

173. As a direct and proximate result of the violations set forth above, the Plaintiffs, the MEMBER STATES, have been injured in their business and property as set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). The RJR DEFENDANTS' violations of 18 U.S.C. § 1962(c) caused these losses. Under the provisions of 18 U.S.C. § 1964(c), the MEMBER STATES are entitled to bring this action and recover herein treble damages, the costs of bringing the suit, pre-judgment interest, and reasonable attorneys' fees. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT IV

MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(RICO, 18 U.S.C. § 1962(d))

174. The MEMBER STATES restate and reallege paragraphs one (1) through one hundred seventy-three (173) and further allege:

175. The RJR DEFENDANTS entered into an agreement with each other and with distributors, shippers, currency dealers, and wholesalers to join in the conspiracy to violate 18 U.S.C. §§ 1962(a), 1962(b), and 1962(c). Each RJR DEFENDANT entered into an agreement to join the conspiracy, and undertook acts in the furtherance of the conspiracy and knowingly participated in the conspiracy. The purpose of the conspiracy was to acquire and service new customers by laundering the proceeds of their criminal activity to the economic detriment of Plaintiffs and to the economic benefit of the RJR DEFENDANTS. The conspirators carried out the scheme and each conspirator was put on notice of the general nature of the conspiracy, that the conspiracy extended beyond the individual role of any single member, and that the conspiratorial venture functioned as a continuing unit for a common purpose. The RJR DEFENDANTS adopted the goal of furthering and facilitating the criminal endeavor. Their stake in the money-laundering venture was in making profits and increasing market share through their informed and interested cooperation with their criminal customers, and their active assistance, stimulation, and instigation of the money-laundering activities. The RJR DEFENDANTS engaged in an actionable wrong, committed jointly with their

coconspirators, and the acts of each member of the conspiracy are imputed to the others because of their common purpose and intent. The RJR DEFENDANTS, acting with their coconspirators, engaged in common action for a common purpose by common agreement and understanding among the group, and are subject to common responsibility.

176. The RJR DEFENDANTS, together with each member of the conspiracy, agreed and conspired to violate: (1) 18 U.S.C. § 1962(a) by using, or causing the use of, income they derived from the above-described pattern of racketeering activities in the acquisition, establishment, and/or operation of the enterprise, the activities of which affect interstate or foreign commerce; (2) 18 U.S.C. § 1962(b) by acquiring or maintaining, or causing the acquisition or maintenance of, through a pattern of racketeering activity, an interest or control in the enterprise, the activities of which affect interstate or foreign commerce; (3) 18 U.S.C. § 1962(c) by participating, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity, including an agreement that the conspirators, or one of them, would commit or cause the commission of two or more racketeering acts constituting such a pattern; and (4) violating the USA Patriot Act.

177. The RJR DEFENDANTS participated in and cooperated with each other and with their coconspirators in the aforementioned conspiracy that enabled each cigarette manufacturer and distributor to enhance its market share, suppress its competition, and promote sale of its products.

178. As a result of the conspiracy, the RJR DEFENDANTS and their coconspirators facilitated the laundering of large volumes of money that constituted the proceeds of criminal activity.

179. The membership of the conspiracy in question includes the RJR DEFENDANTS and tobacco distributors, the shippers, the wholesalers, currency brokers, and the RJR DEFENDANTS' subsidiary corporations, who act in concert to produce the cigarettes, mislabel or fail to properly label the cigarettes, sell the cigarettes, and arrange for payment in a way that is undetectable by governmental authorities, with said payments ultimately being returned to the RJR DEFENDANTS in the United States. As coconspirators, the RJR DEFENDANTS are liable for all of the actions committed by all of the coconspirators within the conspiracy and are liable for all of the damages sustained by the MEMBER STATES that were caused by any members of the conspiracy, regardless of whether the RJR DEFENDANTS were themselves directly involved in a particular aspect of the enterprise.

180. As a direct and proximate result of the violations set forth above, the Plaintiffs, the MEMBER STATES, have been injured in their business and property as set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty- nine (149). The RJR DEFENDANTS' violations of 18 U.S.C. § 1962(d) caused these losses. Under the provisions of 18 U.S.C. § 1964(c), the MEMBER STATES are entitled to bring this action and recover herein treble damages, the costs of bringing the suit, pre-judgment interest, and reasonable attorneys' fees. Furthermore, the

Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT V

MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(RICO, 18 U.S.C. §§ 1964(a), 1964(c), 28 U.S.C. § 1651(a))

181. The MEMBER STATES restate and reallege paragraphs one (1) through one hundred eighty (180) and further allege:

182. The United States District Court is empowered to prevent and restrain violations of 18 U.S.C. § 1962 by issuing appropriate orders, including, but not limited to: ordering any person to divest himself or herself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor in which the enterprise engaged, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons. 18 U.S.C. § 1964(a).

183. The RJR DEFENDANTS currently are actively engaged in the activities set forth within this complaint that promote and support the money laundering that is the subject matter of this complaint.

184. The RJR DEFENDANTS intend to continue said activities and to interfere with investigations by governmental officials into the RJR

DEFENDANTS' and their coconspirators' money-laundering activities.

185. The RJR DEFENDANTS, by their conduct of selling cigarettes to money launderers, creating false and misleading documents, improperly labeling shipments of cigarettes, and establishing and employing mechanisms of payment by which criminals may pay for the cigarettes without being detected by government investigations, all continue to injure the MEMBER STATES.

186. As a result of the RJR DEFENDANTS' conduct in violation of 18 U.S.C. §§ 1962(a), 1962(b), 1962(c), and 1962(d), the MEMBER STATES have been and continue to be irreparably injured as is alleged more fully above.

187. As a result of the nature of the money-laundering activities, it is impossible, as a practical matter, for the MEMBER STATES to put a complete halt to said money-laundering activities as long as the RJR DEFENDANTS continue to conduct these activities. In addition, the MEMBER STATES have suffered and will continue to suffer injury, to business and property to an extraordinary degree as a result of the RJR DEFENDANTS' unlawful conduct.

188. Money damages will not provide a full and complete remedy for the RJR DEFENDANTS' unlawful conduct. There is no adequate remedy at law that will protect the MEMBER STATES in the future from these money-laundering activities if the RJR DEFENDANTS do not cease their involvement in and support of money-laundering activities. Pursuant to 18 U.S.C. §§ 1964(a), 1964(c), as well as 28 U.S.C. § 1651(a), the MEMBER STATES demand full RICO Injunctive and Equitable Relief.

Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT VI

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (COMMON-LAW FRAUD)

189. Plaintiffs restate and reallege paragraphs one (1) through one hundred eighty-eight (188) and further allege:

190. The RJR DEFENDANTS and their coconspirators intentionally falsified documents, falsified shipping records, and generated false and misleading billing records concerning the payment for cigarettes so as to mislead the Plaintiffs, THE EUROPEAN COMMUNITY and the MEMBER STATES, as to the purchasers of and source of funds for payment for their cigarettes. The RJR DEFENDANTS and their coconspirators made these false and material statements and representations and failed to disclose material information in such documents and records with intent to defraud the Plaintiffs. The RJR DEFENDANTS made these material misrepresentations and omissions with the knowledge and intention that the Plaintiffs, THE EUROPEAN COMMUNITY and the MEMBER STATES, would reasonably rely on said documents. The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit the aforesaid tortious acts, and thereby launder criminal proceeds

to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In pursuance of the agreement, the RJR DEFENDANTS and their distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting fraud, thereby causing harm to Plaintiffs. The RJR DEFENDANTS, through agreement and joint action with their coconspirators, acted tortiously, recklessly, and unlawfully to the detriment of Plaintiffs. By means of the aforesaid concerted action, the RJR DEFENDANTS and their coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein.

191. Plaintiffs reasonably relied upon the RJR DEFENDANTS' misrepresentations, and incurred damage as a result of such reliance. Specific examples of the process by which these activities occurred are set forth above.

192. The Plaintiffs, THE EUROPEAN COMMUNITY and the MEMBER STATES, reasonably relied upon falsified or misleading documents produced or procured by the RJR DEFENDANTS, and were thereby misled in the course of performing their duty to fight against money laundering and related criminal activity.

193. Furthermore, the RJR DEFENDANTS knowingly and intentionally generated false, misleading, and material information, and intentionally concealed other material information, concerning their role in money laundering in connection with the sale of their products.

194. The Plaintiffs, THE EUROPEAN COMMUNITY and the MEMBER STATES,

reasonably relied upon data and information provided to them by the RJR DEFENDANTS and/or their coconspirators and agents in acting or refraining from acting with respect to money-laundering activities.

195. The RJR DEFENDANTS, in falsifying documents to expedite money laundering, in providing misleading information, and in concealing material and true information concerning their money-laundering activities, acted in willful, wanton, gross, and callous disregard for the rights of the Plaintiffs, THE EUROPEAN COMMUNITY and the MEMBER STATES. The aforesaid actions were taken knowingly for the purpose of supporting the activities of the RJR DEFENDANTS' coconspirators and with the intent of increasing the profits and sales of the RJR DEFENDANTS and harming THE EUROPEAN COMMUNITY and the MEMBER STATES.

196. RJR DEFENDANTS were duty-bound to disclose the material information concerning the destination of tobacco shipments and the concealed sources of funds used to purchase cigarettes. By law, no person may make false statements to the government. Having undertaken to make representations to THE EUROPEAN COMMUNITY and the MEMBER STATES, DEFENDANTS were obligated to provide full, complete, and truthful information concerning the destination of tobacco shipments and the sources of funds to purchase their products. RJR DEFENDANTS had superior, if not exclusive, knowledge of such information, and it was not readily available to the Plaintiffs. RJR DEFENDANTS intended and knew, or should have known, that Plaintiffs would reasonably rely, act, and

refrain from acting, on the basis of false and/or incomplete information provided to Plaintiffs by RJR DEFENDANTS, and Plaintiffs did so to their detriment. Under these circumstances, RJR DEFENDANTS' conduct amounts to fraudulent misrepresentation and fraudulent concealment, and an effective conversion of Plaintiffs' money and property.

197. As a direct and proximate result of the RJR DEFENDANTS' fraud and the Plaintiffs' reliance upon said fraud, the Plaintiffs have been injured as are set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). The Plaintiffs demand judgment for damages, both compensatory and punitive, as well as full Common-Law Injunctive and Equitable Relief. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT VII

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (PUBLIC NUISANCE — DAMAGES)

198. Plaintiffs restate and reallege paragraphs one (1) through one hundred ninety-seven (197) and further allege:

199. Plaintiffs are governmental authorities.

200. Money laundering and related illicit activities are a violation of U.S. law and a public nuisance.

201. The money-laundering activities in the United States and THE EUROPEAN COMMUNITY

of the RJR DEFENDANTS: (a) have substantially and unreasonably interfered with, offended, injured and endangered, and continue to interfere with, offend, injure and endanger, the public health, morals, safety, convenience, and well-being of the general public, the financial infrastructure of THE EUROPEAN COMMUNITY, and the operation of the market for tobacco products in THE EUROPEAN COMMUNITY and the MEMBER STATES and have interfered with and endangered the Customs Territory, Customs Border, and free market which THE EUROPEAN COMMUNITY is bound to protect; (b) constitute conduct that is proscribed by applicable laws, administrative regulations, and directives; (c) constitute conduct of a continuing nature and/or have produced a permanent or long-lasting effect, and the DEFENDANTS know or should know that said conduct has a significant harmful effect upon the public right.

202. The money-laundering activities of the RJR DEFENDANTS in the United States, THE EUROPEAN COMMUNITY, and the MEMBER STATES have been, and continue to be, effectuated through widespread criminal activity, including mail fraud, wire fraud, and other illegal acts.

203. The RJR DEFENDANTS facilitated the laundering of criminal proceeds by means of a variety of acts and omissions conducted in or directed from the United States, including the following: (a) The RJR DEFENDANTS laundered criminal proceeds by covertly receiving funds that they knew or should have known were the proceeds of criminal acts and took steps to conceal the source and nature of the criminal proceeds, (b) The RJR DEFENDANTS arranged a process by which cigarettes purchased by

criminals could be paid for by secret payments into offshore corporations and/or offshore bank accounts so as to conceal revenues derived from criminal activities, (c) The RJR DEFENDANTS filed or caused the filing with THE EUROPEAN COMMUNITY and/or the MEMBER STATES of false and fraudulent documents that misstated the value of, the intended destination of, and the source of funds for the purchase of cigarettes that were placed within customs-bonded warehouses and/or free-trade zones within THE EUROPEAN COMMUNITY, (d) The RJR DEFENDANTS sold large volumes of U.S.-made cigarettes into Iraq in violation of U.S. laws and to the detriment of the Plaintiffs, (e) The RJR DEFENDANTS failed to supervise the distribution of their tobacco products to assure that such products were not sold into criminal channels or paid for with illicit funds, (f) The RJR DEFENDANTS failed to act reasonably when they were put on notice of their involvement with money launderers. (g) The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit the aforesaid tortious acts and thereby launder money to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In pursuance of the agreement, RJR and its distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting public nuisance, thereby causing harm to Plaintiffs. The RJR DEFENDANTS, through joint action with their coconspirators, acted tortiously, recklessly, unlawfully, and negligently to the detriment of

Plaintiffs. By means of the aforesaid concerted action, the RJR DEFENDANTS and their coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein.

204. Through these and other intentional and negligent acts and omissions, the RJR DEFENDANTS have substantially and unreasonably offended, interfered with, and caused damage to the public in the exercise of rights common to all, in a manner such as to (a) offend public morals, (b) interfere with use by the public of a public place, (c) endanger and injure the property, life, health, safety, peace, convenience, and comfort of a considerable number of persons; and (d) injure and interfere with the market for tobacco products in THE EUROPEAN COMMUNITY and the MEMBER STATES; and (e) injure the economic well being of the citizens of THE EUROPEAN COMMUNITY and the MEMBER STATES. The acts and omissions of the RJR DEFENDANTS constitute a public nuisance under state and federal common law. This public nuisance, or some part of it, continues unabated to the detriment of Plaintiffs' interests and has undermined and endangered the Customs Territory, Customs Border, and free market that THE EUROPEAN COMMUNITY is bound to protect.

205. The RJR DEFENDANTS knew, or reasonably should have known, that their acts and omissions relating to money laundering created great dangers to the community, including Plaintiffs' economic and non-economic interests. The DEFENDANTS directly, or through their coconspirators, undermined THE EUROPEAN COMMUNITY'S duties and authority to regulate ports; to regulate foreign commerce; to regulate

customs territories, free-trade zones, and customs-bonded warehouses; to regulate transportation into THE EUROPEAN COMMUNITY or within its borders; to ensure and regulate the free movement of goods within THE EUROPEAN COMMUNITY; to regulate safety and security at sea; to regulate and take action to protect against breaches of THE EUROPEAN COMMUNITY Customs Territory or THE EUROPEAN COMMUNITY Customs Border; and to regulate and set rules to combat money laundering, all harms different from those suffered by members of the general public or the Member States, and all wrongs which it is the duty and responsibility of THE EUROPEAN COMMUNITY to redress.

206. The RJR DEFENDANTS have acted maliciously, wantonly, and with a recklessness that bespeaks an improper motive and vindictiveness, and have engaged in outrageous and oppressive conduct and with a reckless or wanton disregard of safety and rights. Their conduct amounts to a fraud on the public.

207. As a direct and proximate result of the acts and/or omissions of the RJR DEFENDANTS, which constitute a public nuisance, Plaintiffs have sustained and continue to sustain injury as set forth more fully in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). THE EUROPEAN COMMUNITY and the MEMBER STATES each have the right to recover damages as set forth in paragraphs one hundred forty-four (144) through one hundred forty-nine (149) in that each has suffered damages that are unique to it and which are of a kind different from those suffered by the general public.

208. By reason of the injury to their economic and non-economic interests due to the public nuisance described in the preceding paragraphs to this complaint, Plaintiffs are entitled to an award of damages, including actual, compensatory, restitutionary, and punitive damages. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. §2201(a).

COUNT VIII

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(PUBLIC NUISANCE — INJUNCTIVE RELIEF)

209. Plaintiffs restate and reallege paragraphs one (1) through two hundred eight (208) and further allege:

210. Plaintiffs are governmental authorities.

211. Money laundering and related criminal activities are a violation of law and a public nuisance.

212. The money-laundering activities in the United States and THE EUROPEAN COMMUNITY of the RJR DEFENDANTS: (a) have substantially and unreasonably interfered with, offended, injured and endangered, and continue to interfere with, offend, injure and endanger, the public health, morals, safety, convenience, and well-being of the general public, the financial infrastructure of THE EUROPEAN COMMUNITY, and the operation of the market for tobacco products in THE EUROPEAN COMMUNITY and the MEMBER STATES and have interfered with and endangered the Customs Territory, Customs Border, and free market which THE EUROPEAN COMMUNITY is bound to protect;

(b) constitute conduct that is proscribed by applicable laws, administrative regulations, and directives; (c) constitute conduct of a continuing nature and/or have produced a permanent or long-lasting effect, and the DEFENDANTS know or should know that said conduct has a significant harmful effect upon the public right.

213. The money-laundering activities of the RJR DEFENDANTS in the United States, THE EUROPEAN COMMUNITY, and the MEMBER STATES have been, and continue to be, effectuated through widespread criminal activity, including mail fraud, wire fraud, and other illegal acts.

214. The RJR DEFENDANTS facilitated the laundering of criminal proceeds by means of a variety of acts and omissions conducted in or directed from the United States, including those set forth in paragraphs 46-130 above.

215. Through these and other intentional and negligent acts and omissions, the RJR DEFENDANTS have substantially and unreasonably offended, interfered with, and caused damage to the public in the exercise of rights common to all, in a manner such as to (a) offend public morals, (b) interfere with use by the public of a public place, (c) endanger and injure the property, life, health, safety, peace, convenience, and comfort of a considerable number of persons; and (d) injure and interfere with the market for tobacco products in THE EUROPEAN COMMUNITY and the MEMBER STATES; and (e) injure the economic well being of the citizens of THE EUROPEAN COMMUNITY and the MEMBER STATES. The acts and omissions of the RJR DEFENDANTS constitute a public nuisance under

state and federal common law. This public nuisance, or some part of it, continues unabated to the detriment of Plaintiffs' interests and has undermined and endangered the Customs Territory, Customs Border, and free market that THE EUROPEAN COMMUNITY is bound to protect.

216. The RJR DEFENDANTS knew, or reasonably should have known, that their acts and omissions relating to money laundering created great dangers to the community, including Plaintiffs' economic and non-economic interests. The DEFENDANTS directly, or through their coconspirators, undermined THE EUROPEAN COMMUNITY'S duties and authority to regulate ports; to regulate foreign commerce; to regulate customs territories, free-trade zones, and customs-bonded warehouses; to regulate transportation into THE EUROPEAN COMMUNITY or within its borders: to ensure and regulate the free movement of goods within THE EUROPEAN COMMUNITY; to regulate safety and security at sea; to regulate and take action to protect against breaches of THE EUROPEAN COMMUNITY Customs Territory or THE EUROPEAN COMMUNITY Customs Border; and to regulate and set rules to combat money laundering, all harms different from those suffered by members of the general public or the Member States, and all wrongs which it is the duty and responsibility of THE EUROPEAN COMMUNITY to redress.

217. The RJR DEFENDANTS have acted maliciously, wantonly, and with a recklessness that bespeaks an improper motive and vindictiveness, and have engaged in outrageous and oppressive conduct and with a reckless or wanton disregard of safety and

rights. Their conduct amounts to a fraud on the public.

218. As a direct and proximate result of the acts and/or omissions of the RJR DEFENDANTS, which constitute a public nuisance, Plaintiffs have sustained and continue to sustain injury as set forth more fully in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). In addition, damages do not constitute a full and adequate remedy at law, and for this reason Plaintiffs are therefore entitled to full common-law injunctive and equitable relief, including a judgment permanently enjoining RJR DEFENDANTS from the continuation of activities constituting a public nuisance, and compelling RJR DEFENDANTS to take steps to abate and prevent the money laundering that is the subject matter of this complaint. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT IX

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (UNJUST ENRICHMENT)

219. Plaintiffs restate and reallege paragraphs one (1) through two hundred eighteen (218) and further allege:

220. The RJR DEFENDANTS were unjustly enriched through their money-laundering scheme at Plaintiffs' expense. The acts and omissions of the RJR DEFENDANTS and others have placed in the possession of these DEFENDANTS money under such circumstances that in equity and good conscience they ought not to retain it.

221. The RJR DEFENDANTS were unjustly enriched through their money-laundering scheme. The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit the aforesaid tortious acts and thereby launder the proceeds of criminal activity to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In pursuance of the agreement, the RJR DEFENDANTS and their distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting unjust enrichment, thereby causing harm to Plaintiffs. The RJR DEFENDANTS, through joint action with their coconspirators, acted tortiously, recklessly, unlawfully, and negligently, to the detriment of Plaintiffs. By means of the aforesaid concerted action, the RJR DEFENDANTS and their coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein.

222. THE EUROPEAN COMMUNITY provides at its expense a marketplace without internal frontiers that inures to the benefit of all commercial enterprises that operate within the borders of THE EUROPEAN COMMUNITY. It is this marketplace that makes the sale of products such as cigarettes more expeditious and profitable. The RJR DEFENDANTS and their coconspirators in laundering the proceeds of criminal activity, make illicit use of this marketplace to their economic benefit and to the economic detriment of THE EUROPEAN COMMUNITY and the MEMBER

STATES. The RJR DEFENDANTS were unjustly enriched through their money-laundering scheme. By reason of their money-laundering scheme, the RJR DEFENDANTS were enabled to illegally enhance profits, market share, and the sales price of their international tobacco operations.

223. The unjust enrichment of the RJR DEFENDANTS was accomplished at the expense of Plaintiffs. By reason of the money-laundering scheme, Plaintiffs were, and continue to be, deprived of money and property, and have suffered other economic and non-economic injuries, and RJR DEFENDANTS reaped vast profits and proceeds from their illegal scheme.

224. Under these circumstances, the receipt and retention of the money derived from money-laundering operations are such that, as between Plaintiffs and RJR DEFENDANTS, it is unjust for RJR DEFENDANTS to retain it.

225. Equity and good conscience require the RJR DEFENDANTS to pay damages and restitution to Plaintiffs, disgorge their ill-gotten gains and, to effectuate these remedies, a constructive trust and equitable lien should be imposed by this Court upon the proceeds obtained by the RJR DEFENDANTS by reason of money-laundering activities, which proceeds are rightly owned by and belong to Plaintiffs. Plaintiffs have been injured as set forth more fully in paragraphs one hundred forty-four (144) through one hundred forty-nine (149), and are entitled to recover actual, compensatory, and punitive damages. Judgment in Plaintiffs' favor should include full Common-Law Injunctive and Equitable Relief. Furthermore, the Plaintiffs seek a declaratory

judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT X

MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(UNJUST ENRICHMENT)

226. Plaintiffs restate and reallege paragraphs one (1) through two hundred twenty-five (225) and further allege:

227. RJR DEFENDANTS received funds, including the proceeds of narcotics trafficking, and received the instrumentalities of illicit conduct. Such funds and instrumentalities, and the proceeds thereof, were and are the property of the MEMBER STATES as of the time of the commission of the illicit conduct.

228. By appropriating Plaintiffs' funds and property for themselves, DEFENDANTS have been enriched at Plaintiffs' expense. RJR DEFENDANTS have rejected demands for compensation.

229. Under the circumstances, in good conscience and equity, RJR DEFENDANTS cannot retain such funds and instrumentalities, and the proceeds thereof.

230. Equity and good conscience require the RJR DEFENDANTS to pay damages and restitution to Plaintiffs, disgorge their ill-gotten gains and, to effectuate these remedies, a constructive trust and equitable lien should be imposed by this Court upon the proceeds obtained by RJR DEFENDANTS by reason of money-laundering activities, which proceeds are rightly owned by and belong to Plaintiffs. Plaintiffs are entitled to damages, including actual, compensatory, and punitive damages, and their

injuries are set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). Judgment in Plaintiffs' favor should include full Common-Law Injunctive and Equitable Relief. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. §2201(a).

COUNT XI

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(NEGLIGENCE)

231. Plaintiffs restate and reallege paragraphs one (1) through two hundred thirty (230) and further allege:

232. DEFENDANTS owed, and continue to owe, a duty of reasonable care to refrain from causing foreseeable loss to the Plaintiffs. DEFENDANTS were and are obligated to avoid negligently causing harm to Plaintiffs and were and are duty-bound to:

(a.) design, implement, and utilize effective monitoring and oversight procedures, including appropriate compliance programs, to deter and detect money laundering-related activities by their employees and agents;

(b.) investigate and terminate the money laundering-related conduct of their employees and agents, particularly inasmuch as their managerial personnel with decision-making authority were put on reasonable notice of such illicit conduct;

(c.) deal with the Plaintiffs, and their representatives, in an honest, good faith, and forthright manner;

(d.) terminate sales of their tobacco products to or through persons or entities known to be engaged, directly or indirectly, in money laundering;

(e.) comply with federal and state statutes and the standards of care reflected therein;

(f.) produce, market, and distribute their cigarette products lawfully and with due care; and

(g.) use proper practices and procedures in the hiring, selection, approval, instruction, training, supervision, and discipline of employees and agents engaged in the production, marketing, and distribution of their products, some of whom the RJR DEFENDANTS knew, or reasonably should have known, were assisting and otherwise engaged in money laundering.

233. As manufacturers, distributors, and dominant participants in the marketplace, RJR DEFENDANTS had, and continue to have, the authority and ability to act reasonably to prevent money laundering in connection with the sale of their products for the protection of Plaintiffs. Reasonable steps could and should have been taken by the RJR DEFENDANTS to prevent or reduce the risk of their products being sold to persons who were using the purchase of cigarettes to launder the proceeds of criminal activity.

234. The RJR DEFENDANTS, as manufacturers, distributors, and dominant participants in the marketplace, have a special ability and duty to exercise reasonable care to detect and guard against the risks associated with the distribution of their products, for the benefit and protection of those foreseeably and unreasonably

placed at risk of harm from the distribution of their products, including Plaintiffs.

235. The RJR DEFENDANTS' unreasonable acts and omissions created and enhanced the risk that their products would be distributed to persons who would use the purchase of cigarettes to launder criminal proceeds.

236. The RJR DEFENDANTS' unreasonable acts and omissions affirmatively and foreseeably caused substantial economic and non-economic damages to the Plaintiffs, and otherwise obstructed their ability to protect themselves from harms associated with money laundering. The RJR DEFENDANTS, acting with and through their employees, agents, and coconspirators, breached their duty of care, as aforesaid, by acts and/or omissions that posed an unreasonable and foreseeable risk of harm to Plaintiffs. The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit the aforesaid tortious acts, and thereby launder criminal proceeds to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In pursuance of the agreement, the RJR DEFENDANTS and their distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting negligence, thereby causing harm to Plaintiff. The RJR DEFENDANTS, through joint action with their coconspirators, acted tortiously, recklessly, unlawfully, and negligently, to the detriment of Plaintiffs. By means of the aforesaid concerted action, the RJR DEFENDANTS and their

coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein. The RJR DEFENDANTS' tortious conduct proximately caused, and continues to cause, damage to the economic and non-economic interests of the Plaintiffs, as set forth more fully in paragraphs one hundred forty-four (144) through one hundred forty-nine (149).

237. The RJR DEFENDANTS have acted maliciously, wantonly, and with a recklessness that bespeaks an improper motive and vindictiveness, and have engaged in outrageous and oppressive conduct and with a reckless or wanton disregard of safety and rights. Their conduct amounts to a fraud on the public.

238. By reason of the injury to their economic and non-economic interests due to the negligence of the RJR DEFENDANTS, as aforesaid, Plaintiffs are entitled to an award of damages, including actual, compensatory, and punitive damages. In addition, damages do not constitute a full and adequate remedy at law, and for this reason, Plaintiffs are entitled to full Common-Law Injunctive and Equitable Relief, including a judgment permanently enjoining RJR DEFENDANTS from the continuation of activities constituting negligence, and compelling RJR DEFENDANTS to take steps to abate and prevent the laundering of criminal proceeds through the purchase and sale of their products. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT XII

EUROPEAN COMMUNITY AND MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (NEGLIGENT MISREPRESENTATION)

239. Plaintiffs restate and reallege paragraphs one (1) through two hundred thirty-eight (238) and further allege:

240. The RJR DEFENDANTS owed, and continue to owe, a duty of reasonable care to refrain from causing foreseeable loss to Plaintiffs. The RJR DEFENDANTS have assumed the special duty to speak truthfully to government officials, and particularly due to their superior knowledge of their own conduct, were bound to speak with due care. The RJR DEFENDANTS were and are obligated to avoid negligently causing foreseeable harm to Plaintiffs, and were and are duty-bound to exercise reasonable care to: (a) refrain from negligently misrepresenting — through documents and other forms of communication that the RJR DEFENDANTS knew or should have known would be reasonably relied on by Plaintiffs -- the payment for and/or value of cigarettes; the destination of cigarettes; and the sources of funds with which cigarettes are purchased; (b) be truthful in their representations to Plaintiffs and their representatives concerning money laundering and other improper activities as aforesaid; and (c) avoid misleading Plaintiffs when providing Plaintiffs with such information as the DEFENDANTS possess concerning the money laundering associated with the RJR DEFENDANTS' products into THE EUROPEAN COMMUNITY.

241. The RJR DEFENDANTS breached their duty to Plaintiffs by negligently making various material misrepresentations and/or failing to disclose material information to Plaintiffs and their representatives as aforesaid.

242. The RJR DEFENDANTS have acted maliciously, wantonly, and with a recklessness that bespeaks an improper motive and vindictiveness and have engaged in outrageous and oppressive conduct and with a recklessness or wanton disregard of the Plaintiffs' interests and rights. Their conduct amounts to a fraud on the public.

243. The RJR DEFENDANTS, acting with and through their employees, agents, and coconspirators, breached their duty of care, as aforesaid, by acts and/or omissions that posed an unreasonable risk of foreseeable harm to Plaintiffs.

244. Plaintiffs reasonably relied on DEFENDANTS' misrepresentations and, as a result, DEFENDANTS' breach proximately caused, and continues to cause, damage to the economic interest of Plaintiffs. The RJR DEFENDANTS entered into an understanding or agreement, express or tacit, with their distributors, customers, agents, consultants, and other coconspirators, to participate in a common scheme, plan, or design to commit the aforesaid tortious acts and thereby launder the proceeds of criminal activity to the detriment of THE EUROPEAN COMMUNITY and the MEMBER STATES. In pursuance of the agreement, RJR and its distributors, customers, agents, consultants, and other coconspirators acted tortiously by, among other things, committing the aforesaid acts constituting negligent misrepresentation, thereby causing harm

to Plaintiffs. The RJR DEFENDANTS, through joint action with their coconspirators, acted tortiously, recklessly, unlawfully, and negligently, to the detriment of Plaintiffs. By means of the aforesaid concerted action, the RJR DEFENDANTS and their coconspirators are jointly and severally liable for the torts and other wrongful conduct alleged herein.

245. By reason of the injury to its interests due to the negligence, malice, and recklessness of the RJR DEFENDANTS, as set forth more fully in paragraphs one hundred forty-four (144) through one hundred forty-nine (149), Plaintiffs are entitled to an award of damages, including actual, compensatory, and punitive damages. In addition, damages do not constitute a full and adequate remedy at law, and for this reason, Plaintiffs are entitled to full Common-Law Injunctive and Equitable Relief, including a judgment permanently enjoining the RJR DEFENDANTS from the continuation of activities that gave rise to PLAINTIFFS' claim of negligent misrepresentation. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT XIII

MEMBER STATES

(AS TO ALL RJR DEFENDANTS) (COMMON-LAW CONVERSION)

246. The MEMBER STATES restate and reallege paragraphs one (1) through two hundred forty-five (245) and further allege:

247. The RJR DEFENDANTS received funds, including the proceeds of narcotics trafficking, and received the instrumentalities of illicit conduct. Such funds and instrumentalities, and the proceeds thereof,

were and are the property of the Member States as of the time of the commission of the illicit conduct.

248. The RJR DEFENDANTS were obligated either to remit such funds and instrumentalities to Plaintiffs, or to refuse to accept such funds and instrumentalities. The RJR DEFENDANTS did neither. Instead, the RJR DEFENDANTS appropriated the funds and instrumentalities for their own use.

249. The RJR DEFENDANTS misappropriated Plaintiffs' money and property, and have rejected demands for compensation.

250. The RJR DEFENDANTS have assumed and exercised ownership over funds and instrumentalities belonging to the Plaintiffs. Plaintiffs have sustained and will continue to sustain damages as a result of the RJR DEFENDANTS' conversion, for which the RJR DEFENDANTS are liable to Plaintiffs.

251. The RJR DEFENDANTS have acted maliciously, wantonly, and with a recklessness that bespeaks an improper motive and vindictiveness, and have engaged in outrageous and oppressive conduct and with a reckless or wanton disregard of safety and rights. Their conduct amounts to a fraud on the public.

252. By reason of the injury to their economic and non-economic interests due to the negligence of the RJR DEFENDANTS, as set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149), Plaintiffs are entitled to an award of damages, including actual, compensatory, and punitive damages. In addition, damages do not constitute a full and adequate

remedy at law, and for this reason, Plaintiffs are entitled to full Common-Law Injunctive and Equitable Relief, including a judgment permanently enjoining DEFENDANTS from the continuation of activities constituting conversion, and compelling DEFENDANTS to take steps to abate and prevent the laundering of criminal proceeds through the purchase and sale of their products. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

COUNT XIV

MEMBER STATES

(AS TO ALL RJR DEFENDANTS)
(MONEY HAD AND RECEIVED)

253. The MEMBER STATES restate and reallege paragraphs one (1) through two hundred fifty-two (252) and further allege:

254. The RJR DEFENDANTS knowingly received money belonging to Plaintiffs, including funds representing the proceeds of illicit conduct.

255. The RJR DEFENDANTS benefited from the receipt of money, the benefit of which remains with the RJR DEFENDANTS. A trust or equitable lien is impressed upon such money and the proceeds thereof.

256. Under principles of equity and good conscience, the RJR DEFENDANTS should not be permitted to keep the money and the proceeds thereof. The RJR DEFENDANTS knew that the funds in question were the proceeds of illicit conduct and, as such, were the property of Plaintiffs. Through deceit and acts of concealment, the RJR DEFENDANTS received, handled, deposited, and

transferred such funds to their own accounts. Plaintiffs have changed their positions as a result of the RJR DEFENDANTS' conduct and have been precluded from taking action against those persons involved in the illicit conduct, including the RJR DEFENDANTS, at the time of such conduct. The RJR DEFENDANTS' conduct was tortious, a trespass upon the rights and interests of Plaintiffs, and fraudulent.

257. Equity and good conscience require the RJR DEFENDANTS to pay damages and restitution to Plaintiffs, disgorge their ill-gotten gains and, to effectuate these remedies, a constructive trust and equitable lien should be imposed by this Court upon the proceeds obtained by the RJR DEFENDANTS by reason of money-laundering activities, which proceeds are rightly owned by and belong to Plaintiffs. Further, or in the alternative, Plaintiffs are entitled to damages, including actual, compensatory, and punitive damages, and their injuries are set forth more fully above in paragraphs one hundred forty-four (144) through one hundred forty-nine (149). Judgment in Plaintiffs' favor should include full Common-Law Injunctive and Equitable Relief. Furthermore, the Plaintiffs seek a declaratory judgment in their favor pursuant to 28 U.S.C. § 2201(a).

DEMAND FOR JUDGMENT

WHEREFORE, the Plaintiffs demand judgment in their favor and against DEFENDANTS as follows:

258. Pursuant to COUNT I, damages, including interest, against the RJR DEFENDANTS, jointly and severally, the precise amount to be supplied to the Court upon a trial on the merits;

treble the actual damages pursuant to 18 U.S.C. § 1964(c), along with an award of the costs of the suit and a reasonable attorney's fee.

259. Pursuant to COUNT II, damages, including interest, against the RJR DEFENDANTS, jointly and severally, the precise amount to be supplied to the Court upon a trial on the merits; treble the actual damages pursuant to 18 U.S.C. § 1964(c), along with an award of the costs of the suit and a reasonable attorney's fee.

260. Pursuant to COUNT III, damages, including interest, against the RJR DEFENDANTS, jointly and severally, the precise amount to be supplied to the Court upon a trial on the merits; treble the actual damages pursuant to 18 U.S.C. § 1964(c), along with an award of the costs of the suit and a reasonable attorney's fee.

261. Pursuant to COUNT IV, damages, including interest, against the RJR DEFENDANTS, jointly and severally, the precise amount to be supplied to the Court upon a trial on the merits; treble the actual damages pursuant to 18 U.S.C. § 1964(c), along with an award of the costs of the suit and a reasonable attorney's fee.

262. Pursuant to COUNT V, RICO Injunctive and Equitable Relief against the RJR DEFENDANTS, jointly and severally, along with an award of the costs of the suit and a reasonable attorney's fee.

263. Pursuant to COUNT VI, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits;

Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

264. Pursuant to COUNT VII, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; and the costs of the suit and a reasonable attorney's fee.

265. Pursuant to COUNT VIII, against the RJR DEFENDANTS, jointly and severally, Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

266. Pursuant to COUNT IX, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

267. Pursuant to COUNT X, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

268. Pursuant to COUNT XI, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

269. Pursuant to COUNT XII, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

270. Pursuant to COUNT XIII, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

271. Pursuant to COUNT XIV, against the RJR DEFENDANTS, jointly and severally, an award of compensatory, restitutionary, and punitive damages, with interest, the precise amount to be supplied to the Court upon a trial of the merits; Common-Law Injunctive and Equitable Relief; and the costs of the suit and a reasonable attorney's fee.

272. Such other and similar relief as the Court deems just, proper, and equitable.

273. PLAINTIFFS demand a trial by jury as to all issues triable as of right by jury.

Dated: New York, New York
November 23, 2009

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No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, ACTING ON ITS OWN BEHALF AND ON BEHALF OF THE MEMBER STATES IT HAS POWER TO REPRESENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners, Reynolds American Inc. and associated entities ("Reynolds"), have directed a U.S.-based scheme to sell and distribute U.S.-made cigarettes to and through organized crime, sanctioned regimes, and terrorist groups, and laundered and repatriated the criminal proceeds through U.S. financial institutions. The main objective of this case is equitable relief under State common law in order to enjoin and deter Reynolds' damaging and dangerous conduct. The district court dismissed the Complaint, the Second Circuit unanimously reversed and remanded and, in this interlocutory posture, Reynolds now seeks review. The restated question presented is:

Whether the Second Circuit properly held that the Complaint sufficiently pled RICO claims for purposes of Rule 12(b)(6) of the Federal Rules of Civil Procedure where the court determined: (i) the conduct alleged clearly states a domestic cause of action arising from violations of the predicate statutes of wire fraud, mail fraud and the Travel Act; (ii) plaintiffs have pled a domestic investment of racketeering proceeds; and (iii) plaintiffs adequately alleged violations of the money laundering and material support of terrorism statutes based on the circumstances alleged in the Complaint.

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STATEMENT OF THE CASE

A. Factual Background

For many years, Reynolds has sold cigarettes through organized crime, money launderers, and sanctioned regimes.[1] To combat this scheme, the European Community and 26 of its Member States ("Plaintiffs") filed this action in the District Court for the Eastern District of New York in 2002. The core of the case is Plaintiffs' claim for equitable relief under New York's common law, which is binding by stipulation with respect to the State law claims. The State common law claims include fraud, public nuisance/damages, public nuisance/injunctive relief, unjust enrichment, negligence, negligent misrepresentation, conversion, and money had and received. Plaintiffs also alleged civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, and federal common law. The Second Circuit's summary of the Complaint's factual background (Pet.App. 3a- 5a, 16a-23a, 13a-14a n.5) is adopted herein. A brief summary of the principal domestic allegations is appropriate, however, because Reynolds overlooks the inherently domestic nature of the RICO claims, and disregards the holding of the unanimous Second Circuit that "the conduct alleged here clearly states a *domestic* cause of action." Pet.App. 23a (emphasis added).

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1. The Complaint is found in Petitioners' Appendix ("Pet. App.") at 131a. This case is preceded by related litigation among the parties. *European Community v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated and remanded*, 544 U.S. 1012 (2005), *opinion reinstated*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.), *cert. denied*, 546 U.S. 1092 (2006).

Overview

All of the Reynolds defendants are U.S. companies, incorporated in the United States, with headquarters, operations, and manufacturing facilities located throughout the United States. Pet.App. 140a-150a. Reynolds distributed U.S.-manufactured products through U.S. ports into criminal channels (*see, e.g.*, Pet.App. 158a-159a, 162a-164a, 177a-181a, 194a) and received criminal proceeds in payment in the Reynolds defendants' accounts in the United States. *See, e.g.*, Pet. App. 134a, 175a, 200a, 201a. "The vast majority of the activities of the [Reynolds] DEFENDANTS that are the subject matter of [the] complaint, including management decisions and direction of the schemes, are conducted by the [Reynolds] DEFENDANTS in the United States and, more particularly, from the [Reynolds] DEFENDANTS' offices in the State and City of New York." Pet.App. 203a-204a.

Domestic Pattern of Racketeering Activity

As stated by the Second Circuit, the Complaint alleged that Reynolds "orchestrated a global money-laundering scheme *from the United States* by sending employees and communications abroad." Pet.App. 21a (emphasis added). For example, "RJR 'communicated . . . with [its] coconspirators on virtually a daily basis by means of *U.S. interstate* and international wires as a means of obtaining orders for cigarettes, arranging for the sale and shipment of cigarettes, and arranging for and receiving payment for the cigarettes in question'" (Pet.App. 21a) (emphasis added), which payments included criminal proceeds that were remitted to Reynolds' accounts *in the United States*

(Pet.App. 134a, 175a, 200a-201a), and specifically in *New York City*. Pet.App. 134(a) (emphasis added). "RJR and its coconspirators 'utilized the *interstate* and international mail and wires, and other means of communication, to prepare and transmit documents that intentionally misstated the purchases of the cigarettes in question so as to mislead the authorities *within the United States*, the European Community, and the Member States.'" Pet.App. 21a (emphasis added); *see also* Pet.App. 202(a) ("Large volumes of false documents have been filed with the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms by the RJR DEFENDANTS and/or their coconspirators. The purpose of these filings was to deceive the United States Customs Service and the Bureau of Alcohol, Tobacco and Firearms and allow the criminal activity to continue"). "The Complaint alleges that 'the *U.S. mails and wires* are used by [RJR] to bill and pay for the cigarettes, to confirm billing and payment for the cigarettes, to account for the payment of the cigarettes to [RJR] and [its] subsidiaries, and to maintain an accounting of the proceeds received by [RJR] from the sale of the cigarettes, with said proceeds ultimately being returned to [RJR] *in the United States*.'" Pet.App. 21a-22a (emphasis added). "The Complaint furthermore alleges: . . . RJR executives traveled *from the United States* to Europe and South America to meet with, entertain, and maintain relations with RJR's criminal customers." Pet. App. 22a (emphasis added).

Domestic Investment/Acquisition: "Domestic Operations of Brown & Williamson"

In 2004, Reynolds invested its repatriated racketeering proceeds to acquire "the domestic operations of Brown

& Williamson." Pet.App. 188a-190a. This investment and acquisition was specifically designed by the Reynolds defendants to enable them to "continue and build upon" their money-laundering "enterprise" and "make use of . . . the domestic operations of Brown & Williamson, for the purpose of expanding upon their illegal cigarette sales and money-laundering activities." Pet.App. 189a. The Second Circuit determined that the Complaint sufficiently pled "that RJR acquired Brown & Williamson Tobacco 'for the purpose of expanding upon their illegal cigarette sales and money-laundering activities'" (Pet.App. 5a) and twice held that such allegations stated a claim under 18 U.S.C. 1962(a). *See* Pet.App. 13a-14a n.5; Pet.App. 57a n.1.

B. Proceedings Below

1. The District Court's Decisions

On April 30, 2010, Reynolds moved to dismiss the RICO claims under Fed. R. Civ. P. 12(b)(6). In 2010, this Court decided *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and the Second Circuit summarily applied *Morrison* to RICO in a brief, *per curiam* opinion. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (*per curiam*). The district court ordered supplemental briefing to address *Morrison* and *Norex*, and the juridical status of the European Community. On March 8, 2011, the district court dismissed the RICO claims under Fed. R. Civ. P. 12(b)(6) on the ground that RICO has no application to activity outside the territory of the United States and cannot apply to a foreign enterprise. Pet.App. 37a-54a. On May 13, 2011, the district court dismissed the State common law claims on the ground that the court lacked diversity jurisdiction. Pet.App. 2a.

2. The Appeal

On appeal, Plaintiffs underscored: "The main objective of this action is to obtain enforceable equitable relief that will enjoin the scheme, and compel RJR to adopt the same standards of corporate conduct already embraced by other large multinational tobacco companies, which have already entered into cooperation agreements with the EC and all of its Member States." 2d Cir. Dkt. ECF No. 52 at 4. Plaintiffs' principal argument was that the European Community met the statutory prerequisites for diversity jurisdiction.

Plaintiffs argued that their RICO claims were *domestic* in nature and should not have been dismissed as extraterritorial. *See* 2d Cir. Dkt. ECF No. 52 at 48-49 ("Plaintiffs' RICO claims seek to eradicate a U.S.-based organized criminal conspiracy and thus fall well within RICO's purview under *Norex*. The racketeering activities giving rise to Plaintiffs' claims -- including the pattern of racketeering activity, and the use of its proceeds to commit RICO violations -- occurred in the United States") (citations omitted). Plaintiffs further argued that, even if RICO were limited to domestic enterprises, the Complaint sufficiently alleged that a domestic enterprise was at the heart of the RICO conspiracy. *Id.* at 53 ("the RJR Defendants (U.S. citizens) used and invested the proceeds of racketeering activity, which were repatriated to them in the United States through financial institutions in New York City, to acquire a ***domestic*** enterprise, namely the U.S.-based 'domestic operations of Brown & Williamson, for the purpose of expanding upon [RJR's] illegal cigarette

sales and money-laundering activities") (emphasis in original) (citations omitted).[2]

3. The *Amicus Curiae* Intervention of the United States

On October 7, 2011, the United States intervened as *amicus curiae* in the Second Circuit. 2d Cir. Dkt. ECF No. 63. In its *amicus curiae* brief, signed by the Department of Justice and Department of State, the United States maintained, *inter alia*: (1) the European Community is an "agency or instrumentality" of its Member States within the meaning of the FSIA, and thus a "foreign state" within the meaning of the diversity statute (*id.* at 23-29); (2) RICO claims are territorial either if the enterprise is located or operating within the United States or if the pattern of racketeering occurs within the United States (*id.* at 9-20); and (3) "the United States believes that RICO meets *Morrison's* requirement of a 'clear indication of an extraterritorial application' in part because some of RICO's predicate crimes can only be violated by extraterritorial conduct." *Id.* at 9-10 n.3 (citations omitted). The United States limited its discussion of RICO to its application in the governmental context and declined to "opine on whether the EC's RICO claims are territorial under the standard we propose." *Id.* at 20 n.7.

On February 24, 2012, the appeal was argued before the Second Circuit (Leval, Hall, Sack, JJ.). On March 2,

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2. Plaintiffs also argued that the district court erred in denying leave to amend the complaint to bolster material domestic allegations in the aftermath of *Morrison* (*id.* at 54-58) and in dismissing the federal common law claims. *Id.* at 59-61.

2012, the United States provided a letter to the court listing RICO predicates that by their express terms apply extraterritorially.[3]

4. The Second Circuit's Main Opinion

On April 23, 2014, the Second Circuit unanimously reversed and vacated the judgment of the district court, and remanded the case for further proceedings. Pet.App. 1a-36a.

(i) *Diversity.* The court restored diversity jurisdiction by holding that the European Community was an "agency or instrumentality" of its Member States within the meaning of the Foreign Sovereign Immunities Act (28 U.S.C. 1603(b)). Pet.App. 24a-36a. Reynolds does not challenge this holding before this Court. Pet. 8 n.2.

(ii) *RICO.* The court found that the Complaint sufficiently pled RICO claims for the limited purpose of Rule 12(b)(6). In addressing the scope of RICO, the court applied *Morrison* and the presumption against extraterritoriality, and considered RICO's clear and unambiguous text. The court of appeals construed RICO as an integrated, reticulated whole, reading RICO's private right of action (18 U.S.C. 1964(c)) in conjunction with incorporated substantive provisions of

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3. *See* Letter of Lewis S. Yelin, Esq., U.S. Department of Justice, 2d Cir. Dkt. ECF No. 114 ("At oral argument . . . I informed the Court that the Racketeer Influenced and Corrupt Organizations Act (RICO) contains some predicate crimes that, by their express terms, apply extraterritorially. During the argument, the Court asked the United States to provide a list of such predicate crimes. This letter responds to that request").

RICO (18 U.S.C. 1962). *See* Pet.App. 7a-8a, 13a, 18a n.8. Addressing RICO's limited extraterritorial reach under its interrelated provisions, the court held: "We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The court also explained its decision to read RICO as a whole, stating: "the predicate statutes are incorporated by reference into the RICO statute and are a part of it." Pet.App. 18a n.8.

On this basis, the Second Circuit held:

(a) *Domestic Pattern of Racketeering.* "[T]he conduct alleged here clearly states a domestic cause of action" because the Complaint "satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims" alleged as part of the domestic "pattern of conduct." Pet. App. 23a-24a.

(b) *Domestic Enterprise.* Plaintiffs adequately alleged a RICO violation involving investment in a domestic enterprise in violation of Section 1962(a). Pet.App. 13a-14a n.5. As determined by the court below: "Whether the investment constituting a violation of § 1962(a) must be domestic is without consequence here, because Plaintiffs have pled a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations." *Id.* (citations omitted).

(c) *Money Laundering and Material Support of Terrorism.* Plaintiffs adequately alleged violations of the money laundering and material support of

terrorism statutes based on the "circumstances alleged in the Complaint." Pet.App. 16a. These statutes apply extraterritorially under specified circumstances. *Id.* at 16a-18a.

(iii) *Amendment.* The court's holding that "the conduct alleged here clearly states a *domestic* cause of action" (Pet.App. 23a-24a) (emphasis added) obviated any need for the court to address Plaintiffs' request to amend the Complaint.

5. The Second Circuit's *Per Curiam* Opinion

On May 7, 2014, Reynolds filed its first petition for panel rehearing and rehearing *en banc*. On August 20, 2014, without calling for a response, the Second Circuit unanimously denied Reynolds' petition for panel rehearing in a *per curiam* opinion. Pet.App. 55a-58a. The court held that Section 1964(c) does not require a domestic injury. *Id.* This decision was consistent with *Morrison* inasmuch as the "[t]he presumption against extraterritoriality . . . is primarily concerned with the question of what *conduct* falls within a statute's purview." *Id.* at 58a (emphasis in original). Moreover, the court below held that this Court "has stated unequivocally that 'the compensable injury' addressed by § 1964(c) 'necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern.'" *Id.* at 56a (citation omitted). "If an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, we see no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute." *Id.* at 57a-58a. Reynolds challenged this decision in a second petition for rehearing *en banc*.

6. The Second Circuit's Denial of Rehearing *En Banc*.

On April 13, 2015, without calling for a response, the court of appeals denied Reynolds' two petitions for rehearing *en banc*. Pet.App. 59a-60a. Judge Hall, a member of the original panel, concurred in the denial of rehearing *en banc*, and reaffirmed the decision of the unanimous panel. Pet.App. 60a-68a. Five Judges dissented from denial of *en banc* review, on varying rationales. Pet. App. 68a-104a. On April 20, 2015, the Second Circuit issued its mandate and remanded the case to the district court for further proceedings. On June 4, 2015, the district court stayed proceedings pending this Court's disposition of the petition.

REASONS FOR DENYING THE PETITION

I. This Case Is A Poor Vehicle To Address Extraterritoriality.

Review by this Court is not warranted because the case is an inappropriate vehicle to address the issue of RICO extraterritoriality.

A. RICO Extraterritoriality Is Not Squarely Presented.

This Court should not grant review to address RICO extraterritoriality because this case does not present a genuine problem of extraterritoriality.

In its overarching and overly-aggressive argument, Reynolds argues that this case just involves "foreign

patterns of racketeering conducted through foreign enterprises and causing foreign injuries" (Pet. 12), which it calls a "foreign-cubed" dispute. Pet. 2, 12, 23. Reynolds is entirely mistaken. As detailed below, the Complaint alleges RICO claims that involve domestic racketeering (as held by the Second Circuit); a domestic enterprise (as held by the Second Circuit); and domestic injuries (as recognized by Reynolds in the court below).

First, this case unquestionably involves domestic racketeering activity committed by a group of U.S. companies. The Second Circuit held that "the conduct alleged here clearly states a *domestic cause of action*." Pet. App. 23a (emphasis added). In reaching this determination, the court summarized the domestic schemes:

> The complaint alleges that defendants hatched schemes to defraud in the United States, and that they used the U.S. mails and wires in furtherance of those schemes and with the intent to do so. Defendants are also alleged to have traveled from and to the United States in furtherance of their schemes. In other words, plaintiffs have alleged conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims.

Pet.App. 23a. The court held that Plaintiffs alleged that all elements of the wire fraud, mail fraud, and Travel Act violations "were completed in the United States or while crossing U.S. borders [and] we conclude that the Complaint states *domestic RICO claims* based on violations of those predicates." Pet.App. 16a-17a (emphasis

added). In denying panel rehearing, the court reconfirmed that "the plaintiffs have also alleged that RJR engaged in conduct in the United States satisfying every essential element of each RICO predicate statute that does not apply extraterritorially." Pet.App. 57a n.1. Reynolds' argument, that this case just involves "foreign patterns of racketeering" (Pet. 12), is demonstrably inaccurate.

Second, this case unquestionably involves a domestic enterprise. The Second Circuit twice held that the Complaint sufficiently alleged a proscribed investment in a *domestic* enterprise under 18 U.S.C. 1962(a). Pet. App. 13a-14a n.5; 57a n.1. Specifically, the Second Circuit recognized that the Complaint alleged "that RJR received the profits of its money-laundering schemes in the United States; and that RJR acquired Brown & Williamson Tobacco 'for the purpose of expanding upon their illegal cigarette sales and money-laundering activities.'" Pet. App. 4a-5a (citation omitted). Confirming that a domestic enterprise (Brown & Williamson) is at the heart of the Complaint, the court below held that: "Plaintiffs have pled a domestic investment of racketeering proceeds in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations." Pet.App. 13a-14a n.5 (citations omitted). On rehearing, the panel reconfirmed that "the plaintiffs have pled a domestic investment with respect to their claims under § 1962(a)." Pet.App. 57a n.1. Reynolds' argument, that this case only involves a "foreign enterprise" (Pet. 12, 30), is demonstrably inaccurate.

Third, this case unquestionably involves domestic, as well as foreign, injuries, as Reynolds recognized in the court below. Plaintiffs alleged injuries to business or

property, including in markets in which Plaintiff Member States directly competed with Reynolds, including "the United States." Pet.App. 210a at ¶ 146(a)). Reynolds recognized this allegation in the court below. *See* 2d Cir. Dkt. ECF No. 72 at 17 citing ¶ 146(a). Reynolds' argument, that this case only involves "foreign injuries" (Pet. 12, 30), is demonstrably inaccurate.

Under these circumstances, an application of RICO to the domestic claims sustained by the Second Circuit presents no issue of extraterritoriality. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (application of the wire-fraud statute did not have extraterritorial effect where defendants "used U.S. interstate wires to execute a scheme to defraud a foreign sovereign"); *United States v. Kazzaz*, 592 F. App'x 553, 554 (9th Cir. 2014) ("Because the stipulated facts show a sufficient domestic nexus with the United States for the mail-fraud and wire-fraud counts, we need not address whether these statutes have extraterritorial application"), *cert. denied*, 135 S. Ct. 2388 (2015). Inasmuch as the RICO claims are intrinsically domestic, a decision by this Court on the Question Presented in the petition would not address, much less resolve, the viability of the *domestic* claims that have already been sustained by the Second Circuit. Thus, RICO extraterritoriality is not squarely presented, and review should be denied on this ground alone.

B. This Case Is In An Interlocutory And Fluid Posture.

Review by this Court is not warranted because the judgment below is interlocutory and the case has been "REMANDED for further proceedings." Pet.App. 36a.

That fact "of itself alone furnishe[s] sufficient ground for the denial" of review. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari to review adverse rulings "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"); *Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 515 (2007) (finding no "special circumstances" to "justify the exercise of our discretionary certiorari jurisdiction to review" an interlocutory order). This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *VMI v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of certiorari).

This Court's general rule against review of interlocutory judgments has particular force in this case. The Second Circuit underscored the interlocutory nature of its judgment, and recognized that the contours of this case may well change during proceedings on remand:

> We note that, as we are reviewing a dismissal based solely on the contents of the Complaint, our conclusion is based entirely on the Complaint, which we find sufficient to state an actionable claim. Plaintiffs' ability to prevail will depend, in part, on their ability to present evidence showing that the alleged statutory violation was domestic. Should the pattern of conduct of certain Defendants or certain schemes prove to be extraterritorial, the district court may need to narrow the scope of this action accordingly, through either motions for (partial) summary

> judgment or through carefully tailored jury instructions.

Pet.App. 23a-24a (addressing pattern based on domestic RICO predicates). There is no need for immediate action by this Court at this early stage because Reynolds can, if appropriate, raise any surviving RICO issue upon final judgment and a full evidentiary record. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (*per curiam*) (this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

In the end, even if this Court were to grant review and find the RICO claims insufficient, a remand would likely be necessary to allow the court below to address Plaintiffs' alternative argument that the district court erred in denying Plaintiffs' request to amend the Complaint in the aftermath of *Morrison*. *See NCAA v. Smith*, 525 U.S. 459, 469-470 (1999) (refusing to reach "alternative theories" advanced by respondent in defending judgment in this Court, when theories were not decided below). The Second Circuit held that "the conduct alleged here clearly states a domestic cause of action" (Pet.App.23a) and thus it had no occasion to address Plaintiffs' alternative argument that the district court erred in denying leave to amend to bolster material domestic contacts. A hypothetical decision by this Court (finding the RICO claims insufficient) would not fully and finally resolve the Question Presented in the petition, but rather, set in motion a new and avoidable cycle of litigation on remand. This unsettled state of affairs militates against review by this Court.

C. The Fact-Bound, Rule 12(b)(6) Decision Below Has Limited Impact.

Reynolds' speculation about the supposed untoward results arising from the decision below is highly exaggerated. Pet. 27-29.

First, Reynolds overlooks the early, procedural posture of this case. The court below addressed the Complaint's allegations for the limited purposes of Rule 12(b)(6), and assumed the truth of the allegations, without the benefit of any evidentiary record. The Second Circuit made no findings, enjoined no conduct, and did not alter the status quo. The judgment below is interlocutory and the case is on remand; indeed, Reynolds has publicly predicted that it will prevail on remand.[4] The decision below is limited in scope and affects Reynolds alone.

Second, Reynolds' speculation is belied by actual experience. The decision below has proved to be entirely workable in practice and has been applied to effect the *dismissal* of civil RICO claims -- not to open the floodgates to private, civil litigation. *See, e.g., Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 Fed. Appx. 60, 2014 U.S. App. LEXIS 13496 (2d Cir. 2014) (summary order) (affirming dismissal of RICO claims), *reh'g denied*, Order (2d Cir. Aug. 25, 2014); *Laydon v. Mizuho Bank, Ltd.*, 2015 U.S. Dist. LEXIS 44126, *29-33 (S.D.N.Y. Mar. 31, 2015) (RICO claim predicated on wire fraud dismissed for

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4. *See, e.g.*, Mark Hamblett, Circuit Declines En Banc Review of RJR Nabisco Ruling, N.Y.L.J., April 14, 2015 ("David Howard, a spokesman for R.J. Reynolds Tobacco Company, said in an email . . . 'we have many other strong legal grounds for securing dismissal of this case, and we look forward to presenting them to the district court on remand'").

insufficient domestic contacts); *see also United States v. Prevezon Holdings Ltd.*, 2015 U.S. Dist. LEXIS 104204, *27 (S.D.N.Y. Aug. 7, 2015) ("The court finds that the wire fraud alleged . . . is not sufficiently domestic and is therefore not actionable under U.S. law"); *United States v. Sidorenko*, 2015 U.S. Dist. LEXIS 52452, *10-11 (N.D. Cal. Apr. 21, 2015) (dismissal of an indictment for wire fraud), *appeal dismissed*, Order (9th Cir. July 20, 2015).

Third, the decision below does not invite RICO claims or prosecutions based on "'extraterritorial activities anywhere in the world.'" Pet. 27 (citation omitted). A RICO claim is more than warranted where, as here, there are well-founded allegations that U.S. companies, acting on U.S. soil and using U.S. financial institutions, have engaged in domestic racketeering involving a domestic enterprise resulting in domestic injuries. The claim is particularly justified where, as here, the defendants have not committed to voluntarily cease their documented wrongdoing. It is out of necessity that Plaintiffs have sought relief in a U.S. court, under U.S. domestic law, for U.S. wrongdoing, committed by U.S. defendants. RICO was designed for such situations.[5]

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5. Reynolds also argues that the application of RICO in this case threatens international comity. Pet. 28-29. No issue of comity is presented because Reynolds does not identify "whether 'there is in fact a true conflict between domestic and foreign law.'" *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 798 (1993) (citation omitted).

II. The Question Presented Does Not Warrant This Court's Review.

In any event, the Question Presented in the petition does not warrant review in this case.

A. There Is No Genuine Conflict With The Law Of The Ninth Circuit.

The cornerstone of Reynolds' petition is the assertion that the decision below conflicts with *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) about the territorial scope of RICO. Pet. 2, 11, 16, 19-20, 24, 26, 31. In fact, there is no genuine conflict, much less the sort of deep and unambiguous circuit split that might warrant this Court's review. *See, e.g., United States v. Turkette*, 452 U.S. 576, 578 (1981) (granting certiorari in a RICO case to address a conflict between the First Circuit and eight other Circuits).

First, this case does not provide any occasion for resolving the asserted conflict because the claims are substantially domestic. *See* Point I(A), *supra*. For its part, the Ninth Circuit sustains RICO claims predicated on domestic racketeering. *See Chao Fan Xu*, 706 F.3d at 977 ("focusing on the pattern of Defendants' racketeering activity"). On the facts of this case, the Ninth Circuit would reach the same result as the court below and sustain the domestic RICO claims alleged herein because "the conduct alleged here clearly states a domestic cause of action" and the Complaint "satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims" alleged as part of the domestic "pattern of conduct." Pet.App. 23a-24a. The "conflict" presented in the petition is thus

irrelevant to the ultimate outcome of the case, and the petition should be denied. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 249 (10th ed. 2013) (certiorari may be denied where the question presented is "irrelevant to the ultimate outcome of the case").

Second, the Ninth Circuit's conclusion about RICO's territorial scope was based, in substantial part, upon *Norex,* which has since been clarified by the Second Circuit. The Ninth Circuit stated:

> In the wake of *Morrison*, this circuit has not considered whether RICO applies extraterritorially. We have previously held, however, that RICO is silent as to its extraterritorial application. *See Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004). Other courts that have addressed the issue have uniformly held that RICO does not apply extraterritorially. *See generally Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010); *European Cmty. v. RJR Nabisco, Inc.*, 2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *5 (E.D.N.Y Mar. 8, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 913 (C.D. Cal. 2011); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1349 (S.D. Fla. 2012).

Chao Fan Xu, 706 F.3d at 974. The post-*Morrison* authorities relied upon by the Ninth Circuit -- namely, *Norex* and three district court decisions relying upon *Norex* -- substantially formed the precedential basis for the Ninth Circuit's ruling that "RICO does not apply extraterritorially." *Id.* at 974-975. As of today, however,

the Second Circuit has clarified *Norex* on several occasions (Pet.App. 7a-9a, 12a, 56a, 61a, 63a-67a) and confirmed that *Norex* should not have been read "as a ruling that RICO can never have extraterritorial reach in *any* of its applications." Pet.App. 9a (emphasis in original). Because the brief, *per curiam* opinion in *Norex* was the first federal appellate decision to address RICO extraterritoriality in the aftermath of *Morrison*, it generated widespread confusion among the lower courts. The Second Circuit's authoritative clarification of *Norex* dispels that confusion and puts in doubt the Ninth Circuit's *Norex*-rooted reasoning about RICO's scope.[6]

Third, once the issue has been allowed to percolate with the benefit of the Second Circuit's recent decision, it is likely that the Second Circuit's decision will resonate with the Ninth Circuit, particularly in light of the persuasive position of the United States. *See* U.S. Amicus Brief, 9-10 n.3 ("the United States believes that RICO meets *Morrison's* requirement of a 'clear indication of an extraterritorial application' in part because some of RICO's predicate crimes can only be violated by extraterritorial conduct").

Like the court below, the Ninth Circuit is a strong and consistent adherent to the cardinal principal that "we must

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6. *Chao Fan Xu* also relied upon *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004). *Poulos* was a pre-*Morrison* decision, which applied the now-supplanted "conduct and effects" test, in a case involving only the domestic predicate act of mail fraud. *Poulos*, 379 F.3d at 659 ("The predicate act underlying the RICO claims is the Casinos' alleged violation of the mail-fraud statute, 18 U.S.C. § 1341"). *Poulos* has been superseded by *Morrison*, as noted by Reynolds. Pet. 15.

interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Boise Cascade Corp. v. United States EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *accord Garcia v. Brockway*, 526 F.3d 456, 463 (9th Cir. 2008) (*en banc*) (Kozinski, C.J.); *United States v. Neal*, 776 F.3d 645, 652 (9th Cir. 2015). Like the court below, the Ninth Circuit reads RICO "in its entirety" in ascertaining its proper application. *United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979) ("A reading of § 1962(c) and Title IX in its entirety indicates that *any* enterprise which is conducted through a pattern of racketeering activity falls within the statute") (emphasis in original), *cert. denied*, 445 U.S. 946 (1980); *see also Petroleos Mexicanos v. Hewlett-Packard Co.*, No. 14-cv-05292-BLF, ECF No. 60 at 22 (N.D. Cal. July 13, 2015) ("nothing in the RICO statute or the cases cited suggests isolating the analysis of Section 1964(c) from the remainder of the RICO statute").

Consistent with this holistic approach, the Ninth Circuit reads interrelated statutes together to ascertain their territorial scope. For example, the Ninth Circuit "has regularly inferred extraterritorial reach of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses." *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 (9th Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985); *see also United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205 (9th Cir. 1991) ("the crime of 'accessory after the fact' gives rise to extraterritorial jurisdiction to the same extent as the underlying offense"); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("harboring offense and the offenses of being an accessory after the fact, aiding and abetting,

and conspiracy, all [are] deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them"); *United States v. Layton*, 855 F.2d 1388, 1395 (9th Cir. 1988) ("Because the underlying substantive statute, § 351(a), reaches extraterritorial conduct, related statutes governing conspiracy and aiding and abetting should also be construed to apply extraterritorially"). Because the Ninth Circuit construes *separately enacted* statutes together to ascertain territorial scope, it follows, *a fortiori*, that the Ninth Circuit would likely read the interlocking provisions of RICO -- a *single*, integrated statute -- as a whole in ascertaining its territorial reach.

The likelihood of this outcome is reinforced by the fact that the Ninth Circuit's approach continues to be widely applied in the aftermath of *Morrison*. *See, e.g.*, *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013) ("when the underlying criminal statute's extraterritorial reach is unquestionable, the presumption [against extraterritoriality] is rebutted with equal force for aiding and abetting") (citations omitted); *United States v. Lawrence*, 727 F.3d 386, 395 (5th Cir. 2013) ("courts have 'inferred the extraterritorial reach of conspiracy statutes on the basis of a finding that the underlying substantive statutes reach extraterritorial offenses'") (citation omitted), *cert. denied*, 134 S.Ct. 1340 (2014); *see also United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012) (Wesley, J.) ("As for § 924, which criminalizes the use of a firearm during commission of a crime of violence, every federal court that has considered the issue has given the statute extraterritorial application where, as here, the underlying substantive criminal statutes apply extraterritorially"), *cert. denied*, 133 S.Ct. 2371 (2013); *United States v. Shibin*, 722 F.3d 233, 247 (4th Cir. 2013)

("as an ancillary crime to underlying crimes that apply extraterritorially, § 924(c) applies coextensively with the underlying crimes"), *cert. denied*, 134 S. Ct. 1935 (2014).[7]

Fourth, in the absence of a genuine conflict with the Ninth Circuit (or any other Circuit), Reynolds points to district court decisions. Pet. 17-18. However, virtually all of those fact-intensive decisions -- like *Chao Fan Xu* -- relied upon the now-clarified decision in *Norex*, and thus, they provide little or no basis for further consideration. In the future, it is likely that the district courts will be aligned with the decision of the Second Circuit, for the reasons stated above. At this time, however, even if there were a conflict between the decision below and an unappealed district court decision, such a "conflict" generally provides no basis for review by this Court. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 505 (10th ed. 2013).

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7. Reynolds' reliance on *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076 (10th Cir. 2014) is misplaced. Pet. 16-17. The Tenth Circuit explicitly declined to reach the question of RICO extraterritoriality. *CGC Holding Co.*, 773 F.3d at 1098 ("we do not decide the merits of plaintiffs' claims, including the extent to which those claims involve an extraterritorial application of RICO [and] [s]ince the question of the extraterritoriality of a statute is a merits question, resolving it must await a final disposition from the court below"). Similarly, the D.C. Circuit declined to reach out to address the avoidable issue of RICO extraterritoriality, and thus allowed the issue to percolate for further development. *See Hourani v. Mirtchev*, 2015 U.S. App. LEXIS 13342 *13 (D.C. Cir. July 31, 2015) ("we need not wade into the thorny question of whether or when RICO applies to such foreign conduct" because plaintiffs "have litigated this case and framed their arguments on the assumption that neither RICO nor the Hobbs Act applies extraterritorially").

B. The Second Circuit Correctly Applied *Morrison*.

Contrary to Reynolds' argument that the decision below "contravenes *Morrison*" (Pet. 12, 31-35), the decision below was a straightforward and correct application of *Morrison*, and does not warrant further review.

(a) The Second Circuit's Decision Is Rooted In RICO's Text.

The Second Circuit, in a unanimous opinion authored by Circuit Judge Pierre N. Leval, accorded full effect to "the Supreme Court's ruling in *Morrison* that the presumption against extraterritorial application of U.S. statutes bars such application absent a clear manifestation of congressional intent." Pet.App. 7a (citation omitted); *see also* Pet.App. 3a (recognizing and applying the "presumption against extraterritorial application of a U.S. statute"); Pet.App. 16a (same). Reynolds overlooks the Second Circuit's faithful application of the presumption against extraterritoriality, and it gratuitously and incorrectly criticizes the Second Circuit for its treatment of the presumption. *See, e.g.*, Pet. 12 ("the Second Circuit[] . . . once again degrades the presumption against extraterritoriality").

Mindful of the presumption against extraterritoriality, the Second Circuit carefully considered and applied RICO's "text" (Pet.App. 9a-11a), and thus adhered to this Court's teaching that "when it comes to 'the scope of [the] conduct prohibited by [the statute], *the text of the statute controls our decision.*'" *Morrison*, 561 U.S. at 261 n.5 (citation omitted) (emphasis added); *id.* at 265 (calling for "'the most faithful reading' of the text") (citation omitted);

id. at 267 n.9 (test "based on the text" is "the better one"); *id.* at 270 (criticizing proposed test for lack of "any textual support").

The Second Circuit's text-based judgment about the limited extraterritorial reach of RICO was both correct and narrow:

> We conclude that RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate. Thus, when a RICO claim depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially, RICO will apply to extraterritorial conduct, too, but only to the extent that the predicate would. Conversely, when a RICO claim depends on violations of a predicate statute that does not overcome *Morrison*'s presumption against extraterritoriality, RICO will not apply extraterritorially either.

Pet.App. 9a. This was a straightforward application of *Morrison.*

Circuit Judge Peter W. Hall, concurring in the denial of rehearing *en banc*, reaffirmed that the Second Circuit's construction of RICO "is wholly consistent with *Morrison.*" Pet.App. 63a. Judge Hall stated:

> In *Morrison*, the Supreme Court explained that there is a presumption against construing United States statutes as applying extraterritorially

> but that the presumption is overcome when the statute clearly manifests a congressional intent that it apply extraterritorially. *See Morrison*, 561 U.S. at 265. Courts are not to justify extraterritorial application by speculating that Congress would have wanted that had it focused on the question. On the other hand, when Congress, acting within its powers, has explicitly provided for extraterritorial application of a statute, as it has done by incorporating statutes that apply extraterritorially into RICO as predicates, the statute must be interpreted as Congress has directed. The purpose of *Morrison* was to bar courts from attributing to Congress an intent that its statutes apply extraterritorially in the absence of a clear expression thereof; it was not to prevent courts from giving effect to Congress's clearly manifested intentions that certain statutes apply extraterritorially.

Pet.App. 63a. *See* Pet.App. 100a (Lynch, J., dissenting from denial of rehearing *en banc*) ("By including certain crimes with extraterritorial application as RICO predicates -- including some that can *only* be committed abroad -- Congress unequivocally expressed its intention that RICO apply to patterns of racketeering activity that include such crimes") (emphasis in original).

(b) The Second Circuit Correctly Construed RICO As A Whole.

Reynolds argues that the Second Circuit "misunderstands RICO" (Pet. 31) and it should not have

read RICO's predicates as an integral part of RICO itself. Pet. 32-33 ("the clear congressional intent to make some predicate statutes extraterritorial" does not indicate "clear congressional intent to make *RICO itself* extraterritorial"). In fact, however, the Second Circuit correctly and necessarily read the RICO statute as a whole in ascertaining its territorial scope.

Morrison confirms that it is necessary to construe a statute as a whole to ascertain its territorial scope. *Morrison* considered the relevant provisions of the Securities Exchange Act of 1934 before concluding that it lacked extraterritorial reach. *See Morrison*, 561 U.S. at 261 (Section 10(b) of the Exchange Act "contains nothing to suggest it applies abroad"); *id.* at 268 ("the exclusive focus on *domestic* purchases and sale is strongly confirmed by §30(a) and (b) [of the Exchange Act]") (emphasis in original); *id.* at 267 ("primacy of the domestic exchange is suggested by the very prologue of the Exchange Act"). *Morrison* also considered separately enacted statutes -- the Exchange Act and the Securities Act of 1933 -- to ascertain the territorial scope of the Exchange Act. *Id.* at 268-269.

Morrison's consideration of the overall statutory scheme comports with long-settled law. As Chief Justice Rehnquist observed, in ascertaining a statute's territorial scope, a court must construe the statute "as a whole." *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 255 (1991) ("*ARAMCO*"); *accord Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion) (Scalia, J.) ("it is, of course, the most rudimentary rule of statutory construction . . . that courts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes") (citations omitted).

Consistent with the foregoing, the Second Circuit correctly read RICO's integrated, interlocking provisions as a whole in ascertaining its territorial scope. Pet. App. 7a-8a, 9a-12a. The Second Circuit explained its decision to read RICO as an integrated whole:

> It might be argued that Congress's clear statement in the predicate statute that *it* applies extraterritorially does not constitute a congressional statement that a RICO charge predicated on that statute applies extraterritorially. This overlooks the fact that the predicate statutes are incorporated by reference into the RICO statute and are a part of it.

Pet.App. 18a n.8 (emphasis in original). The Second Circuit's approach thus comports with *Morrison*, *ARAMCO*, and *Branch*.

Throughout its petition, Reynolds relies upon certain individual dissents from the denial of rehearing *en banc*; however, the intra-Circuit dissention boils down to whether RICO should,[8] or should not,[9] be read as a whole

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8. *See, e.g.*, Pet.App. 7a-8a, 13a, 18a n.8 (main opinion of the Court); *id.* at 55a-58a (*per curiam* opinion of the Court); *id.* at 61a-63a (Hall, J., concurring in the denial of rehearing *en banc*); *id.* at 100a (Lynch, J., dissenting) ("By including certain crimes with extraterritorial application as RICO predicates—including some that can *only* be committed abroad—Congress unequivocally expressed its intention that RICO apply to patterns of racketeering activity that include such crimes") (emphasis in original).

9. *See* Pet.App. 71a (Cabranes, J., dissenting) ("Although it is indisputable that Congress intended for certain RICO predicate

in ascertaining its territorial scope. In construing RICO as a whole, the Second Circuit applied the settled approach of *Morrison*, *ARAMCO* and *Branch*, and the intra-Circuit dissention at the *en banc* stage in the court below is thus immaterial. In any event, an internal circuit split (if one can be inferred from the individual dissents at the *en banc* stage) is not a sufficient ground for granting review. *Joseph v. United States*, 135 S. Ct. 705, 705 (2014) ("we usually allow the courts of appeals to clean up intra-circuit divisions on their own") (Justice Kagan, with whom Justice Ginsburg and Justice Breyer join, respecting the denial of certiorari); *see also Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*) ("[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties").

Seeking to circumvent RICO's clear, integrated text, Reynolds requests that this Court grant review and impose a civil-criminal distinction in the construction of RICO. *See, e.g.*, Pet. 12, 13, 23, 25, 27, 28, 30, 35 (suggesting special rules for civil litigation). Nothing in the interwoven text of RICO allows for that dichotomy. Moreover, this Court routinely rejects proposed civil-criminal distinctions in the construction of hybrid statutes with criminal and civil application, such as RICO. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 488-500 (1985) (RICO's private civil remedy (§ 1964(c)) is not construed more narrowly than RICO's criminal provisions

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statutes to apply to actions or events abroad, there is no clear basis for concluding that Congress intended for RICO itself to go along with them"); *id.* at 82a-83a (Raggi, J., dissenting) ("The terms of the extraterritorial crimes identified as RICO predicates authorize extraterritorial jurisdiction for prosecutions under the referenced proscribing criminal statutes, not for RICO claims alleging such predicates").

(§ 1961 or § 1962) to include a prerequisite for a prior criminal conviction or a racketeering injury); *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 660 (2008) (RICO's private civil remedy (§ 1964(c)) may not be read to include a "first-party reliance" requirement where the relevant predicate act (mail fraud) imposes no such requirement); *accord Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context . . ."); *Basic Inc. v. Levinson*, 485 U.S. 224, 240 n.18 (1988) ("We find no authority in the statute, the legislative history, or our previous decisions, for varying the standard of materiality depending on who brings the action . . ."); *Aaron v. SEC*, 446 U.S. 680, 691 (1980) (statute is consistently applied "regardless of the identity of the plaintiff or the nature of the relief sought"). The Second and Ninth Circuits agree that there is no civil-criminal distinction in the construction or application of RICO. Pet.App. 13a (citing 18 U.S.C. 1962(c), 1964(c)); *id.* at 8a (citing 18 U.S.C. 1962, 1964); *id.* at 9a (RICO is consistently applied in cases imposing "liability or guilt"); *Chao Fan Xu*, 706 F.3d at 975 (RICO is applied consistently "in a civil or criminal context").

While overlooking the interrelated provisions of RICO, Reynolds misstates the holding of the Second Circuit. Reynolds argues that the Second Circuit "misunderstands RICO" because it treated RICO as "'an aggravating statute that simply adds new consequences to the predicate offenses.'" Pet. 31-32 (citation omitted). In attributing that "misunderstanding" to the Second Circuit, Reynolds inexplicably omits the full quote from

the Second Circuit, which states:

> The RICO statute incorporates by reference numerous specifically identified federal criminal statutes, as well as a number of generically described state criminal offenses (known in RICO jurisprudence as "predicates"). 18 U.S.C. § 1961(1). It *adds new* criminal and civil *consequences to the predicate offenses* in certain circumstances — generally speaking, when those offenses are committed in a pattern (consisting of two or more instances) in the context of "any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962; see also id. § 1964.

Pet.App. 7a-8a (emphasis added). By selectively referencing only the italicized text above, Reynolds fails to faithfully restate the holding of the Second Circuit, which confirms that the predicate offenses -- alleged as part of a pattern -- together represent one of several elements of a viable RICO claim or prosecution under the integrated statute, and the Court did not rule that the predicates "simply" give rise to liability or guilt under RICO in the absence of the other statutory prerequisites.[10]

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10. Reynolds compounds its misstatement by attributing a quote to the Second Circuit (purportedly appearing at Pet.App. 15a) that does not appear in the court's opinion. *See* Pet. 32 ("with the courts effectively '*looking through*' to the underlying predicate statutes") (emphasis added).

(c) The Second Circuit's Decision Is Reinforced By RICO's History.

While RICO's text is clear and unambiguous (and thus there is no need to consider legislative history), the Second Circuit's construction of RICO as an integrated whole is reinforced by RICO's legislative history, as confirmed by Judge Hall. *See* Pet.App. 61a-62a.[11] Reynolds overlooks this legislative history.

After the terrorist attacks of 9/11, Congress amended RICO through the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, "which, among other provisions, amended RICO by adding to its list of predicates nearly 20 antiterrorism statutes that expressly apply to foreign conduct." Pet.App. 61a-62a (Hall, J., concurring in denial of rehearing *en banc*) citing Pub. L. No. 107-56, § 813, 115 Stat. 272, 382 (Oct. 26, 2001), codified at 18 U.S.C. 1961(1)(G). Judge Hall underlined that the House Report explained that the amendment of RICO to include acts of terrorism as predicate acts would expand the reach of RICO in both criminal and civil contexts. *Id.* The House Report states: "These provisions merely enhance the civil and criminal consequences of certain crimes that have been deemed RICO predicates by Congress and provide better investigative and prosecutorial tools to identify and prove crimes." *See* Report of the House Committee on the Judiciary, H. Rept. 107-236 on H.R. 2975 (Part 1) at 70 (Oct. 11, 2001).

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11. "[S]tatutory language, context, history, or purpose" may be considered to ascertain a statute's territorial scope. *Small v. United States*, 544 U.S. 385, 391 (2005).

The House Report explicitly stated that the amendment would enhance RICO in the private, civil context: "Anyone injured by a RICO violation may recover treble damages, court costs, and attorney fees under the civil RICO laws." *Id.* at 70.

The USA PATRIOT Act's legislative history also confirms that RICO and its incorporated predicates (notably, money laundering) operate as an integrated whole in both criminal and civil contexts. The USA PATRIOT Act expanded the scope of the money-laundering statute to provide for inclusion of foreign corruption offenses as money-laundering crimes. Pub. L. No. 107-56, § 315, 115 Stat. 272, 308 (Oct. 26, 2001), codified at 18 U.S.C. 1956(c)(7). While enacting this expansion of 18 U.S.C. 1956, Congress concomitantly rejected an amendment proposed for the benefit of the "tobacco companies" that would have limited their "RICO liability." *See* 147 Cong. Rec. H7198 (daily ed. Oct. 23, 2001). Then-Senator (now U.S. Secretary of State) John F. Kerry confirmed that the USA PATRIOT Act provided for the continued protection of U.S. allies in their "civil" actions in U.S. courts under U.S. law. *See* 147 Cong. Rec. S11028-29 (daily ed. Oct. 25, 2001) (statement of Sen. Kerry) ("our allies will have access to our courts and the use of our laws if they are the victims of smuggling, fraud, money laundering, or terrorism [and] [w]e shall continue to give our full cooperation to our allies in their efforts to combat smuggling and money laundering, including access to our courts and the unimpeded use of our criminal and civil laws").

The Second Circuit's construction of RICO as an integrated, coherent whole -- without resort to any civil-criminal distinction -- fully comports with RICO's text, structure, and history.

(d) The Second Circuit Correctly Rejected the "Domestic Injury" Limit.

Reynolds' attempt to use *Morrison* to restrict Section 1964(c) to domestic injuries (Pet. 24, 30, 31, 35) is unsupportable.

First, no court has adopted the proposed "domestic injury" requirement, and indeed, it has been widely rejected. *See* Pet.App. 55a-58a (rejecting domestic injury limit); *Petroleos Mexicanos v. Hewlett-Packard Co.*, *supra* (rejecting argument that Section 1964(c) imposes a "domestic injury" requirement), *citing*, *inter alia*, *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp.2d 933, 944 (N.D. Cal. 2012) ("*Morrison's* holding bars courts from refusing to apply RICO simply because the scheme's effects are felt abroad"), *remanded on other grounds*, 2015 U.S. App. LEXIS 11574 (9th Cir. Cal. July 6, 2015). The domestic injury limit was properly rejected by the unanimous Second Circuit (Pet.App. 55a-58a) and not one of the 15 Judges of the Second Circuit who participated below affirmatively embraced the proposed limit.

Second, *Morrison* rejected a domestic injury test very similar to the one advocated by Reynolds here. *Morrison* recalled that the Second Circuit applied Section 10(b) of the Exchange Act under its so-called "'effects test,' 'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens.'" *Morrison*, 561 U.S. at 256 *quoting SEC v. Berger*, 322 F.3d 187, 192-193 (2d Cir. 2003). *Morrison* squarely rejected this test, as Reynolds recognizes. Pet. 13-14. *Morrison* thus provides no basis for Reynolds to revive the supplanted "effects test."

Third, the proposed "domestic injury" limit has no textual support. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court" and recover damages and other relief. 18 U.S.C. 1964(c). This provision is not limited to "domestic persons" or persons "domestically injured" or injuries to "domestic business or property." In the absence of an Act of Congress, this Court does not exclude foreign governments from the protections of U.S. law. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978) (declining to limit the reach of the Clayton Act to "only American consumers" and holding "[n]either the fact that the [plaintiffs] are foreign nor the fact that they are sovereign is reason to deny them the remedy of treble damages Congress afforded to 'any person' victimized by violations of the antitrust laws").

Fourth, this Court has consistently declined to engraft extratextual limitations upon RICO, such as Reynolds' proposed "domestic injury" limit. *See, e.g., Sedima*, 473 U.S. at 481 (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'"); *H. J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) ("the argument for reading an organized crime limitation into RICO's pattern concept . . . finds no support in the Act's text, and is at odds with the tenor of its legislative history"); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *Bridge*, 553 U.S. at 660 ("RICO's

text provides no basis for imposing a first-party reliance requirement").

Accordingly, the Second Circuit correctly rejected the proposed domestic injury requirement, and this Court should not grant review in order to create one.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 2015

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No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

MOTION AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37(2)(b) of the Rules of this Court, Washington Legal Foundation (WLF) respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Petitioners. On August 18, 2015, more than 10 days prior to the due date for WLF's brief, undersigned counsel notified counsel of record for all parties of WLF's intention to file. Although counsel for Petitioners consents to the filing of WLF's brief, counsel for Respondents opposes WLF's filing its brief within the time frame permitted by Rule 37(2)(a). Accordingly, this motion for leave to file is necessary.

WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears in this Court as *amicus curiae* to defend the presumption that, absent clear congressional intent to the contrary, Acts of Congress do not provide a remedy for alleged misconduct occurring outside the United States. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Australian Bank Ltd.*, 561 U.S. 247 (2010). WLF also regularly participates in litigation concerning the proper scope of civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO). *See, e.g., Pfizer Inc. v. Kaiser Found. Health Plan Inc.*, 134 S. Ct. 786 (2013); *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008).

WLF has long been concerned that the reflexive invocation of RICO by civil litigants engaged in garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens the federal judiciary. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now frequently invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Among the many creative attempts to drastically expand RICO's reach, none are more problematic than recent civil suits brought by foreign governments against American businesses for overseas conduct.

WLF has no direct interest, financial or otherwise, in the outcome of this case. It submits this brief solely due to its interest in ensuring the Court's further judicial review of the important question presented by the Petition. Because of its lack of a direct interest, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate as an *amicus curie* in this case.

Respectfully submitted,

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August 31, 2015

QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, applies extraterritorially.

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INTEREST OF *AMICUS CURIAE*[1]

The interests of Washington Legal Foundation (WLF) are more fully set forth in its accompanying motion for leave to file this brief. In short, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF agrees with Petitioners that the Second Circuit's opinion deepens even further an existing circuit split on whether, and to what extent, RICO applies extraterritorially. By extending RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, the decision below implicates several areas of confusion among the lower courts as to the statute's proper reach. The petition is therefore an excellent vehicle for providing sorely needed guidance on an important and recurring question of law. WLF writes separately to address the significant harm that will result for both our civil justice system and U.S. interests abroad if the decision below is allowed to stand. For the reasons that follow, WLF joins with Petitioners in urging this Court to grant certiorari.

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[1] Pursuant to Supreme Court Rule 37(6), *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days before the due date, counsel for WLF provided counsel for all parties with notice of WLF's intent to file this brief.

STATEMENT OF THE CASE

RICO, 18 U.S.C. § 1961 *et seq.*, creates criminal penalties for a broad range of conduct involving covered enterprises and patterns of racketeering activity. It also authorizes "any person injured in his business or property by reason of" a violation of RICO's criminal provisions to bring a civil suit to recover treble damages, plus the cost of bringing the suit. 18 U.S.C. § 1964(c). The petition invites the Court to decide, once and for all, whether RICO provides such a civil remedy for extraterritorial conduct, and if so, to what extent.

Petitioners are RJR Nabisco, Inc. (RJR) and several related entities. Respondents are the European Community (EC) and 26 member states.[2] Respondents sued Petitioners under RICO, alleging that Petitioners conspired with cigarette wholesalers in such far-flung countries as Colombia and Croatia, among other places, to launder monies derived from the sale of illegal narcotics in Europe. Pet. App. 2a-3a. The complaint alleges that, in furtherance of this global conspiracy, Petitioners engaged in various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, and money laundering. *Id.* at 3a-5a. As a result of these alleged RICO violations, Respondents claim myriad injuries to European governments and their economies in the form of lost tax revenues, higher law enforcements

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[2] Since this lawsuit was originally filed, the European Community has been incorporated into the European Union. *See European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 148 (2d Cir. 2014).

costs, and reduced profits to their state-owned tobacco businesses. *Id.* at 211a-228a.

The United States District Court for the Eastern District of New York dismissed Respondents' RICO claims. Applying this Court's holding in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court found that because the RICO statute is "silent as to any extraterritorial application," it "has none." Pet. App. 44a. And because the enterprise alleged in the complaint consisted of "a loose association of Colombian and Russian drug-dealing organizations and European money brokers whose activity was directed outside the United States," the complaint failed to state an actionable claim under RICO. *Id.* at 5a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, expressly holding that RICO applies extraterritorially. The appeals court rejected the district court's conclusion that RICO cannot apply to extraterritorial conduct because "with respect to a number of offenses that constitute predicates for RICO liability ... Congress has clearly manifested an intent that they apply extraterritorially." Pet. App 3a. The panel also fully extended RICO to foreign enterprises, reasoning without any statutory basis that this Court's presumption against extraterritorial application of U.S. laws "does not command giving foreigners carte blanche to violate the laws of the United States." *Id.* at 14a. As to several of the alleged RICO predicates (including mail and wire fraud), the appeals court acknowledged that those statutes do not apply extraterritorially but nevertheless held that the

complaint alleged sufficient domestic activity to come within RICO's ambit. *Id.* at 18a-24a.

Petitioners sought rehearing on the basis that, regardless of the geographic scope of the alleged RICO enterprise or any underlying predicate acts, 18 U.S.C. § 1964(c) requires a domestic *injury* before a plaintiff is entitled to treble damages. Pet. App. 55a-58a. In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries as well. Reasoning that this Court's presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," the panel held that such a presumption does not apply to the question of extraterritorial injury caused by violations of RICO. *Id.* at 58a.

Petitioners sought rehearing en banc, which was denied by an 8-5 vote. Judge Jacobs, writing for all five dissenters, insisted that further review was needed in light of the "frequency of RICO litigation" in the Second Circuit and the "tension" between the panel opinion and prior precedent, including *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (holding that because "RICO is silent as to any extraterritorial application ... it has none"). Pet. App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, lamented that "a panel of our court has discovered and announced a new, and potentially far-reaching, judicial interpretation of the statute—one that finds little support in [the] history of the statute, its implementation, or the precedents of the Supreme Court." Pet. App. 73a.

Writing for the same four judges, Judge Raggi criticized the panel opinion for creating a circuit split and failing to follow this Court's approach to extraterritorial analysis in *Morrision*. She urged further review not only to decide whether "RICO applies extraterritorially" but in order to establish "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet. App. 77a.

SUMMARY OF ARGUMENT

The petition raises a question of exceptional importance. Although a straightforward application of this Court's precedents clearly dictates that RICO does not apply extraterritorially, substantial confusion persists among the lower federal courts as to the extent of the statute's extraterritorial reach, if any. Rather than provide clarity, the Second Circuit's decision below muddles the law further by extending RICO to cover foreign racketeering, foreign enterprises, *and* foreign injuries. In an era of ever-increasing globalization, this Court's review is desperately needed to safeguard the longstanding presumption against the extraterritorial application of U.S. law.

Even when cabined to wholly domestic matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert ordinary civil disputes into federal racketeering claims. And RICO provides treble damages and recovery of all costs, including attorney fees, to prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follow the news that a defendant company has been accused of "racketeering" activity, civil RICO

plaintiffs encounter little trouble extracting settlements for even the most frivolous claims.

Giving extraterritorial effect to a statute with the unparalleled breadth and civil remedies of RICO will only make matters worse. The decision below unquestionably will invite wholly foreign litigation into the United States, where it does not belong. Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will dramatically increase the burden on the federal courts, impose higher litigation costs on multi-national businesses, and force defendants into coercive settlements. This is of particular concern in light of this Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, as activist plaintiffs are strategically pivoting to civil RICO as a surrogate for claims that are now foreclosed under the Alien Tort Statute.

Finally, review is warranted to help ensure that federal courts do not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences unintended by the political branches. Although the plaintiffs in this case happen to be foreign sovereigns, the vast majority of civil RICO litigation is initiated by private plaintiffs. The doctrine of international comity reduces conflicts among nations regarding whose courts should hear disputes over which both countries might exercise jurisdiction. If ill-considered decisions by U.S. courts are allowed to blur the accepted territorial limits of U.S. law, other nations may retaliate in kind. As a result, U.S. companies could likely find themselves subject to similar actions brought by overseas plaintiffs.

REASONS FOR GRANTING THE PETITION

I. THE GLOBAL EXPANISION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE

A. Civil RICO Is Uniquely Vulnerable to Abuse by the Plaintiffs' Bar

Although RICO was adopted as a new law enforcement tool for combatting organized crime, the civil RICO provision, 18 U.S.C. § 1964(c), has rarely been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year primarily target legitimate, everyday business activity that would not fit most people's definition of racketeering. And because RICO is drafted so broadly, plaintiff's attorneys can file as RICO claims a growing number of disputes that Congress never could have foreseen. "Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936-37 (1990).

Because the "danger of vexatiousness" is especially strong in RICO cases, *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987), the statute has become a highly profitable vehicle for the plaintiffs' bar. As a result, judges and legal scholars

have routinely criticized the overly expansive reach of civil RICO, which provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

The attractiveness of civil RICO for plaintiffs and the plaintiffs' bar is not difficult to understand. RICO applies not only to individual actors, but also to corporations, and promises treble damages and recovery of costs, including attorney fees, to prevailing plaintiffs. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provisions, which allow suit to be brought in any district where the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), invite forum shopping by RICO plaintiffs.

Moreover, plaintiffs can always threaten to use the provocative public-relations implications of RICO's title to coerce settlements from companies who understandably fear the loss of goodwill and reputation that would accompany the news that the

company has been accused of "racketeering" activity. "Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those action's RICO violations." Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990).

Statistical studies suggest that plaintiffs are filing RICO lawsuits based on alleged "racketeering" conduct that federal prosecutors see no reason to pursue. "Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year, while in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24 (2013). Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002). Even when confined to its proper domestic sphere, civil RICO is uniquely vulnerable to abuse.

B. Extraterritorial Application of RICO Will Only Invite Further Abuse

Unless this Court intervenes, frivolous RICO claims will proliferate even more under the appeals court's aberrant holding below. While civil actions under RICO have always been a lightning rod for

criticism, extending RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, as the Second Circuit has now done, further exacerbates the problem. The unusual breadth of RICO, and the mischief that will accompany its extension into wholly foreign disputes, make this Court's review all the more necessary.

Among the many creative attempts to expand the law's reach, none are more unfounded than recent civil RICO suits brought by foreign governments against American businesses for alleged "racketeering" activities overseas. *See* Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006) ("[T]he clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by *foreign* governments.").[3] Such use of RICO exceeds even the reach of the statute's overly expansive language.

Although such disputes are best adjudicated in the courts of the countries that bring them, opportunistic plaintiffs are seeking to extract the settlement of frivolous claims from American companies unable to cope with the threat of treble damages and the unfavorable publicity that arises whenever one is labeled a "racketeer." These plaintiffs carefully tailor their complaints to meet the statutory requirements of a RICO lawsuit:

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[3] Available at http://www.wlf.org/publishing/publication_detail.asp?id=1767.

> These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyer's convert the government's evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and *replace* them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged "schemes." The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

Sanchez & O'Scannlain, *supra*, at 3.

If this Court were to deny review in this case, foreign governments and their political subdivisions would undoubtedly view the decision below as a free-standing invitation to bring RICO suits against U.S. multi-national companies in federal district courts inside the Second Circuit. And one can easily imagine the onslaught of similar RICO cases that would be brought by foreign agencies, municipalities, and business competitors against U.S. companies absent this Court's intervention. Individual foreign plaintiffs, too, will surely take advantage of RICO's unusual breadth to refashion foreign-law claims as civil RICO claims. The availability of treble damages and attorney fees under RICO would dramatically increase the settlement value of such claims. Such easy access to federal courts would provide foreign plaintiffs with American procedural advantages (*e.g.*,

discovery, class actions, jury trials, and contingent-fee arrangements with counsel) that are simply unavailable in most foreign jurisdictions.

Because RICO has been so broadly interpreted, the existing split of authority regarding the threshold legal issue of extraterritoriality provides no clear answer for companies—be they domestic or international—about the extent to which their entirely overseas conduct may be deemed subject to treble-damages liability in the United States. As this Court has emphasized, "[s]imple jurisdictional rules ... promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). In the absence of a consistent and uniform interpretation of RICO, the risk of protracted litigation and ruinous damage awards will also likely discourage legitimate businesses from engaging in perfectly legitimate market activity that *might* subject them to suit here.

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the reach of the admittedly overbroad statute. To the contrary, WLF recognizes that it is not this Court's role to rewrite RICO, and that any *statutory* deficiencies are best addressed by Congress. *Sedima*, 473 U.S. at 500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because the plaintiffs are not taking advantage of it in its more difficult applications."). Nonetheless, jettisoning the presumption against extraterritoriality would be such a dramatic expansion of RICO that the Court should, as Petitioners urge, grant review to carefully

consider whether Congress could really have intended that result.

II. IN THE WAKE OF *KIOBEL*, ACTIVIST PLAINTIFFS VIEW CIVIL RICO AS A SURROGATE FOR CLAIMS THAT ARE NOW FORECLOSED UNDER THE ALIEN TORT STATUTE

Giving extraterritorial application to a statute of RICO's breadth would also enable plaintiffs to circumvent the important territorial limits that this Court has recently recognized in the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which authorizes federal courts to hear claims brought by aliens for only a "modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

The ATS existed for over 200 years but was rarely used until 1976, when a cohort of enterprising plaintiffs' attorneys seized on the law to sue a former Paraguayan police chief on behalf of two Paraguayan nationals for the kidnap, torture, and murder of their son—in Paraguay. That lawsuit resulted in the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), which expressly enabled alleged victims of human rights violations to bring suit in federal court.

For decades following *Filartiga*, human rights activists routinely relied on the ATS as their vehicle of choice to sue multi-national corporations for alleged overseas violations of the "law of nations," and many lower federal courts interpreted the ATS to permit a global remedy for international

law violations. *See* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 35 (2008) (stating that the Second Circuit's *Filartiga* decision "spawn[ed an] entirely new way[] of looking at the law" and "triggered a wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts").

This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), not only rejected the notion that the ATS creates a global cause of action, but it did so unanimously. Requiring dismissal of plaintiffs' claims against foreign defendants based on the actions of a foreign government in its own territory, the Court held that nothing in the text, history, or purpose of the ATS suggested that Congress intended to override the venerable presumption against extraterritorial application of U.S. law. 133 S. Ct. at 1665-69. The Court held further that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

After the Court granted certiorari in *Kiobel*, "litigators in the broader [human rights] community appear[ed] to be undergoing a recalibration—a search for alternative vehicles by which to sustain the momentum in litigating involvement in extraterritorial abuses." Julian Simcock, *Recalibrating After* Kiobel*: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Litigating International Corporate Abuse*, 15 CUNY L. REV. 301, 304 (2012); *see also* Eric Allen Engle, *Extraterritorial Jurisdiction: Can RICO*

Protect Human Rights?, 3 J. HIGH TECH. L. 1, 10 (2004) (proposing "the use of RICO to supplement and fortify claims under [the ATS]").

Indeed, "the well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses." Simcock, *supra*, at 306. Moreover, "[a] certain similarity exists between RICO and the [ATS]: both import foreign substantive law as the basis of a new independent federal claim." Engle, *supra*, at 9. Most traditional human rights abuses, such as murder, robbery, bribery, extortion, etc., all easily qualify as predicate offenses under RICO. *Ibid.*

"Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well." Simcock, *supra*, at 310. Indeed, it is rather telling that some of the most far-fetched ATS lawsuits also included RICO claims. *See, e.g., Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of a quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (asserting ATS and RICO claims against fifty corporate defendants for their "complicity" in South African apartheid); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011) (asserting ATS and RICO claims against U.S. military contractors in connection with alleged abuses at the Abu Ghraib military prison in Iraq).

Such ATS and RICO claims are sometimes dismissed by the district court on foreign non conveniens grounds, only to be reinstated later on appeal. *See, e.g., Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (suit by Nigerian citizens against Dutch and British holding companies alleging human rights abuses stemming from oil exploration in Nigeria). Others survive the pleadings stage but are later disposed of on summary judgment—*precisely* on the ground that RICO does not apply extraterritorially. *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (suit by Myanmar citizens against Myanmar government and government-owned oil company for human rights abuses in furtherance of an oil-pipeline project).

Much like its earlier *Filartiga* decision ushered in a flood of ATS litigation, the Second Circuit's deeply flawed decision below, if left undisturbed, will effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. As a result, claims that would otherwise have little or no settlement value as ATS claims will, when recast as civil RICO claims seeking treble damages, provide even greater leverage against defendants than that available under the ATS.

In sum, permitting the use of civil RICO as a substitute for ATS litigation would saddle U.S. multi-national companies with potentially paralyzing risks of liability. If human-rights activists are able to bring suit in district courts inside even a single federal circuit that allows RICO to encompass

overseas activities, American companies will find themselves litigating claims of this sort for many years to come.

III. THE DECISION BELOW THREATENS TO UNDERMINE AMERICA'S VITAL FOREIGN POLICY INTERESTS

The Second Circuit's overly expansive interpretation of RICO's territorial reach not only ignores this Court's longstanding presumption against the extraterritoriality of federal law, but it threatens to undermine American foreign policy interests. Rather than ignoring federal law, courts should examine possible conflicts of law, consider the weight of the U.S. government's interests, and consider whether those interests are sufficiently compelling to outweigh principles of international law, comity, sovereignty, and reciprocity. By exercising RICO jurisdiction over events taking place in foreign countries whose governments have a much greater stake in those events than do American courts, the panel's opinion risks considerable conflict between the laws of the United States and the laws of those foreign countries—in the absence of any clear indication from Congress that it approves of such litigation.

The disastrous ramifications of the holding below are by no means limited to the parties in this case. Although the plaintiffs here happen to be foreign governments, that is the narrow exception to the rule. The overwhelming majority of civil RICO litigation is initiated not by governments, but by private plaintiffs. This is of critical concern because private plaintiffs often do not "exercise the degree of

self-restraint and consideration of foreign governmental sensibilities" as sovereign governments might. *See, e.g.*, Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194 (1999).

Foreign sovereigns zealously guard their own territorial prerogatives, but extending unusually broad statutes like RICO—which contains onerous criminal forfeiture provisions and provides for generous civil remedies including treble damages—to conduct occurring exclusively overseas, would encroach upon traditional sovereign interests and foster international resentment. Indeed, the Second Circuit's expansive construction of RICO dramatically increases the likelihood that foreign companies and individuals will find themselves named as *defendants* in future civil RICO actions. As Judge Cabranes explained in his dissent from the denial of rehearing en banc:

> If this decision remains undisturbed, the prevailing plaintiffs here, the European Community and its member states, will have achieved a pyrrhic victory, and one that the Community's constituents will have cause to regret in the years ahead. Why? Because its citizens, natural and corporate, are among the likely targets of future RICO actions under the panel's interpretation of the statute.

Pet. App. 70a. If the Second Circuit's decision is allowed to stand, foreign defendants will increasingly be subjected to the burdens of intrusive discovery, pretrial litigation, and even trial in U.S. courts based on overseas conduct.

This Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). This rule of statutory construction "cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* at 164. Such an approach "reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow" and "thereby helps the potentially conflicting laws of different nations work in harmony—a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65.

The presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian Am. Oil. Co.*, 499 U.S. 244, 248 (1991). This canon "preserv[es] a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. 247, 261 (2010). In contrast, applying American laws to foreign conduct or events often constitutes "an interference with the authority of another sovereign, contrary to the comity of nations." *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). Such extraterritorial application of American laws is controversial and can often lead to the impression that the United States is imposing its values on the rest of the international community. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2005) (applying the "presumption that United States law governs domestically but does not rule the world").

Foreign countries frequently object to extraterritorial application of United States law. Subjecting a foreign company to intrusive discovery and extensive pretrial litigation may well impose burdens inconsistent with the policies of its home nation. This Court has cautioned that lower federal courts "should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Distr. of Iowa*, 482 U.S. 522, 546 (1987) ("American courts should take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations.").

The presumption against extraterritoriality is especially strong where, as here, the statute affords civil remedies substantially different in kind from those available under foreign law. As this Court has emphasized in limiting the extraterritorial reach of federal antitrust laws, "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies." *Empagran*, 542 U.S. at 164. For that reason, "several foreign nations" have complained that "apply[ing] our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations." *Ibid.*

In recent years, the European Union and other foreign regulators have become much more aggressive in enforcing their antitrust laws and other laws regulating business. This Court has long

recognized that "interference with the authority of another sovereign, contrary to the comity of nations" may breed resentment. *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 29 (1925). But if ill-considered decisions by U.S. appeals courts are allowed to blur the accepted territorial limits of U.S. law, U.S. companies will likely find themselves subject to similar actions by foreign plaintiffs based on their domestic actions that have alleged effects overseas.

Respecting the laws of foreign nations not only prevents such retaliation toward the United States, but it also best furthers the interests of the United States and the international business community. Congress, in conjunction with the Executive Branch, has consistently sought to increase America's standing in world markets. Those important efforts will be undercut significantly if the decision below is allowed to stand. "The expansion of American business and industry will hardly be encouraged if ... we insist on a parochial concept that all disputes must be resolved under our laws and our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

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No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

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The question presented in the petition for certiorari—whether or to what extent RICO applies extraterritorially—undeniably warrants this Court's attention. Just recently, the D.C. Circuit recognized the split on this issue between the decision below and the Ninth Circuit's decision in *Xu*. Respondents do not seriously deny the existence of this circuit split; instead, they contend that the split might resolve itself. However, the Second Circuit refused to reconsider its decision en banc, despite recognizing that it conflicts with *Xu* and despite several strong dissents from denial. Moreover, the Ninth Circuit has continued to apply *Xu*, despite the Second Circuit's decision. The split is thus mature, and respondents do not deny that it implicates an important and recurring question.

Respondents contend that this case does not squarely present the question of RICO's extraterritoriality. That would come as a surprise to the panel, which addressed at length precisely that question; to the five circuit judges who dissented from denial of en banc on that question; and to the district judge, who has stayed proceedings below pending the disposition of this petition. Respondents assert that their complaint alleges some domestic racketeering activity, one domestic enterprise, and one domestic injury. However, the complaint also undeniably alleges one foreign enterprise and a slew of foreign racketeering activity and injuries. The scope of this case thus turns dramatically on whether the Second Circuit correctly extended RICO to foreign racketeering activity, foreign enterprises, and foreign injuries, and the presence of all three makes

this case an ideal vehicle for considering RICO's extraterritoriality.

Finally, Respondents argue at length about the merits. However, those arguments provide no good reason for this Court to ignore the entrenched circuit split, and are unpersuasive even on their own terms.

I. The Question Presented Clearly Warrants Review

The question whether RICO applies extraterritorially, and if so to what extent, is an important and recurring one that has divided the courts of appeals and produced widespread confusion more generally.

A. As shown in the petition, the decision below squarely conflicts with *United States v. Xu*, 706 F.3d 965 (9th Cir. 2013), in which the Ninth Circuit held that "RICO does not apply extraterritorially" (*id.* at 974) and that any alleged pattern of racketeering, "to the extent it [is] predicated on extraterritorial activity," is thus "beyond the reach of RICO" (*id.* at 978). Moreover, even before the Second Circuit created that split, there was widespread confusion between one line of cases (including *Xu*) holding that RICO is limited to domestic patterns of racketeering but extends to foreign enterprises, and another line of cases holding that RICO is limited to domestic enterprises but extends to foreign patterns of racketeering. Pet. 16-25.

After the petition was filed, the D.C. Circuit confirmed the existence of the circuit split. In *Hourani v. Mirtchev*, Nos. 13-7088 & 13-7099, 2015 U.S. App. LEXIS 13342 (D.C. Cir. July 31, 2015), that court managed to avoid what it described as the

"thorny question of whether or when RICO applies to . . . foreign conduct." *Id.* at *13. The D.C. Circuit explained that "[t]he courts of appeals have split on the issue," and it specifically contrasted the holding below that "RICO can apply to extraterritorial conduct 'if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate'" with the holding of the Ninth Circuit that "RICO does not apply extraterritorially" and thus requires a domestic "pattern of racketeering activity." *Id.* at *13 n.2 (citations omitted).

Without seriously contesting the existence of the circuit split, respondents speculate that the split might resolve itself because the various courts to have held that RICO has no extraterritorial application may now reverse themselves, fall in line behind the Second Circuit, and conclude that RICO does after all extend to extraterritorial patterns, enterprises, and injuries. Opp. 20, 23. However, in nearly 18 months since the decision below, not a single court outside the Second Circuit has reversed itself on RICO's extraterritoriality or otherwise adopted the Second Circuit's extreme position. Moreover, the Ninth Circuit recently *reaffirmed* its position despite being urged by the plaintiff to follow the Second Circuit. *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, No. 13-15848, 2015 U.S. App. LEXIS 11574, at *6 (9th Cir. July 6, 2015) (remanding "with instructions for the district court to apply the test set forth in *Chao Fan Xu*"); *see* Brief of Plaintiff-Appellee and Cross-Appellant at 27-31, *Mitsui*, CA9 No. 13-15848 (ECF Docket No. 27-1).

Respondents nonetheless speculate that the decision below "will resonate with the Ninth Circuit"

(Opp. 20) because that court has looked to object offenses to determine the extraterritorial scope of derivative crimes such as conspiracy and aiding-and-abetting. Opp. 21-23. But as Judge Raggi explained, that analogy critically misunderstands the role of predicate offenses in RICO itself. Pet.App. 90a-91a. In any event, the Government in *Xu* invoked that analogy as a basis for extending RICO to extraterritorial patterns of racketeering activity, *see* Govt. Br. at 47-53, *Xu*, CA9 No. 09-10189 (ECF No. 53-1), but the Ninth Circuit rejected it there, then rejected it again in *Mitsui*.

Finally, Respondents briefly contend that the Ninth Circuit, despite its contrary legal rule, would "reach the same result" on the "facts of this case." Opp. 18. That is incorrect. In this case, the Second Circuit allowed respondents to pursue RICO claims predicated on allegations of domestic mail fraud, wire fraud, and Travel Act violations (Pet.App. 18a-24a) *and* on allegations of extraterritorial money laundering and material support for terrorism (Pet.App. 17a-18a). By contrast, the Ninth Circuit, faced with comparable allegations of domestic and foreign racketeering activity, squarely limited the claims before it to the former. *See* 706 F.3d at 978 ("to the extent it was predicated on extraterritorial activity," claim at issue was "beyond the reach of RICO").

B. As shown in our petition, the Second Circuit's foreign-cubed expansion of RICO is a matter of considerable importance, as it provides a roadmap for various kinds of exotic disputes from around the world to make their way into federal court. Pet. 26-29; *see also* WLF Amicus Br. 7-21.

Respondents do not dispute that the extraterritorial scope of RICO is an exceptionally important question, but they nonetheless claim the decision below is a "fact-bound" one that will have only "limited" impact. Opp. 16. Respondents attempt to limit the decision to its facts, which they say involve "allegations that U.S. companies, acting on U.S. soil and using U.S. financial institutions, have engaged in domestic racketeering involving a domestic enterprise resulting in domestic injuries." Opp. 17. But respondents ignore the presence of *other* critical facts—namely their own allegations of extraterritorial predicate acts, extraterritorial enterprises, and extraterritorial injuries. As we have shown, the Second Circuit categorically extended RICO to foreign patterns of racketeering activity, to the extent predicated on offenses that apply extraterritorially (Pet.App. 9a); to foreign enterprises (Pet.App. 14a); and to foreign injuries (Pet.App. 58a). Its decision could hardly have been more sweeping.

For similar reasons, respondents miss the point in trying to minimize the decision below as interlocutory. It is true enough, as respondents note, that the scope of the case may change on remand. Opp. 14-16. Nonetheless, the Second Circuit has now definitively adopted a dramatic expansion of RICO, which will bind not only the district court on remand, but also all other cases and appeals within the Second Circuit. Moreover, despite respondents' suggestion to the contrary, a decision by this Court addressing the territorial scope of RICO would "fully and finally resolve" that question, and would in no sense be "hypothetical" (Opp. 15).

Finally, respondents point to two RICO cases dismissed as impermissibly extraterritorial even under the decision below. Opp. 16. Both were predicated "exclusively on the wire fraud statute," which applies only domestically. *Petroleos Mexicanos v. SK Eng'g & Constr. Co.*, 572 F. App'x 60, 61 (2d Cir. 2014); *see Laydon v. Mizuho Bank, Ltd.*, No. 12 Civ. 3419, 2015 U.S. Dist. LEXIS 44126, at *30 (S.D.N.Y. Mar. 31, 2015). However, under the decision below, *all* RICO claims predicated on offenses that apply extraterritorially *would* be viable—including, for example, claims predicated on allegations of money laundering to facilitate narcotics trafficking in Europe, to facilitate human-rights abuses in Iraq, or to facilitate political corruption in Kazakhstan. Pet. 27-28; *see* Pet.App. 72a-73a n.8 (Cabranes, J., dissenting from denial of en banc). Moreover, this concern is far from hypothetical, as the decision below has already changed specific outcomes in actual cases. Pet. 27.

II. This Case Squarely Raises The Question Presented

Respondents' lead objection to certiorari is that "this case does not present a genuine problem of extraterritoriality," because their RICO claims allege "domestic racketeering (as held by the Second Circuit); a domestic enterprise (as held by the Second Circuit); and domestic injuries (as recognized by Reynolds in the court below)." Opp. 10. But respondents do not, and cannot, dispute that their RICO claims *also* allege a slew of foreign racketeering activity, at least one foreign enterprise, and some three dozen foreign injuries. That is why the Second Circuit had to *answer* the question

presented. Pet.App. 18a (claims satisfy "requirements for extraterritorial application of RICO"). Moreover, because respondents' extraterritorial allegations lie at the heart of their case, the courts' answer to the extraterritoriality question—along any of its possible dimensions—has significant practical as well as theoretical significance to the case. Accordingly, this case presents an ideal vehicle for answering the question presented.

A. Throughout their brief, Respondents claim that the Second Circuit held that they had stated a "domestic cause of action." Opp. 1, 8, 9, 11, 15, 18 (all quoting Pet.App. 23a). True enough, but respondents omit half of what the Second Circuit actually held. That court recognized that the complaint alleged domestic predicate acts *and* foreign predicate acts, it analyzed each set separately, and it concluded that RICO covers *both*.

After the Second Circuit concluded that "RICO applies extraterritorially if ... liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate" (Pet.App. 9a), the court then applied that rule to "the conduct alleged in the complaint" (Pet.App. 16a). In the holding trumpeted by respondents, the court concluded that the alleged wire fraud, mail fraud, and Travel Act violations were domestic, and thus could serve as RICO predicates even though those statutes do not apply extraterritorially. Pet.App. 18a-24a. However, the court *further* held that the allegations of money laundering and material support for terrorism could *also* serve as RICO predicates in this case. As to those allegations, the court recognized that the

alleged misconduct occurred overseas, but held that RICO nonetheless applied because those predicate offenses "apply extraterritorially" to the conduct alleged. Pet.App. 16a-18a.[1]

The question presented thus squarely controls the permissible scope of respondents' RICO claims. And that makes a critical difference, because the alleged money laundering lies at the heart of respondents' allegations. For example, the complaint's introduction refers exclusively to money laundering (Pet.App. 134a-136a), with mail or wire fraud not even mentioned until paragraph 47 (Pet.App. 161a) and the Travel Act not even mentioned until paragraph 159 (Pet.App. 239a). Moreover, the complaint formally defines the actionable enterprise as "the RJR Money-Laundering Enterprise" (Pet.App. 238a), and it describes the other alleged predicate acts as playing a supporting role to money laundering. Pet.App. 203a ("The money-laundering scheme is advanced by numerous acts of wire fraud and mail fraud ...."). In turn, the permissible scope of the predicate acts affects not only the evidentiary presentation but also the available damages, which must "flow from the commission" of the actionable "predicate acts." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985); *see Anza v. Ideal Steel Supply*

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[1] Respondents do not dispute that their allegations of money laundering and material support involve purely extraterritorial conduct. Indeed, every step of the alleged money-laundering scheme involved foreign transactions, including the sale of cigarettes by Petitioners to wholesalers. Pet. 4-5; Pet.App. 152a-159a; Pet.App. 174a (alleging in-person sales in Colombia); Pet.App. 176a (same).

Corp., 547 U.S. 451, 460 (2006) (requiring "direct causal connection" between predicate acts and ensuing injury). Thus, if RICO does not extend to extraterritorial money laundering, respondents cannot recover for any injuries that it may have caused them. For all of these reasons, excising the alleged money-laundering predicates would dramatically scale back the case.

B. This case also squarely presents the question whether RICO requires a domestic enterprise. The operative complaint alleges an "RJR Money-Laundering Enterprise" consisting of Petitioners, overseas narcotics dealers, and various other overseas "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants." Pet.App. 237a-238a. The district court held that this alleged enterprise was "foreign," given its nerve center in far-flung locales. Pet.App. 52a. The panel below did not dispute that holding (Pet.App. 12a), and respondents do not dispute it in their brief in opposition. The Second Circuit thus had ample reason to decide whether RICO extends to foreign enterprises. Pet.App. 14a-15a.

Respondents highlight the Second Circuit's conclusion that the complaint *also* alleged a *different* enterprise, namely the Brown & Williamson Tobacco Company. Pet.App. 13a-14a n.5. That is the basis for respondents' repeated assertion (Opp. 5, 8, 11, 12, 17) that this case rests on a domestic enterprise. In fact, it now rests on two alleged enterprises—one foreign and one domestic.

The question whether RICO extends to *both* enterprises significantly impacts this case. The alleged foreign "RJR Money-Laundering Enterprise"

supports the claim that petitioners conducted the affairs of an enterprise through a pattern of racketeering activity—in other words, that they used the covered "enterprise" as a *vehicle* for racketeering. *See* 18 U.S.C. § 1962(c). In contrast, the Brown & Williamson allegation supports the entirely distinct claim that petitioners invested the proceeds of racketeering activity in an enterprise—in other words, that they made the covered "enterprise" a *victim* of racketeering. *See id.* § 1962(a). Not surprisingly, the damages associated with these distinct theories are also different—as the panel itself recognized, a plaintiff seeking damages for a violation of § 1962(a) "must allege an 'injury from the defendants' investment of racketeering income in an enterprise,' rather than relying on the violation of one of the predicate acts." Pet.App. 13a-14a n.5 (quoting *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir. 1990)). The enterprise question thus also matters here.

C. Respondents' assertion of "domestic" injuries (Opp. 12-13) is equally beside the point. The complaint alleges three dozen injuries, the overwhelming majority of which are purely foreign injuries to sovereign states, such as lost taxes, increased law enforcement costs, and harm to foreign economies. Pet.App. 214a-227a. Excising those alleged injuries would dramatically scale back this case.

III. The Second Circuit Was Wrong On The Merits

Respondents' extended merits arguments do not obviate the need for this Court to resolve the

entrenched circuit split. In any event, they are unpersuasive even on their own terms.

After long block-quotes from the decision below, which we have already addressed (Pet. 31-35), respondents invoke the truism that RICO must be construed "as a whole." Opp. 26-29. But that does not mean *importing* the extraterritorial force of *distinct predicate offenses* cross-referenced in it. As respondents correctly explain, this Court considered the Securities Exchange Act in its entirety in determining whether § 10(b) of that Act applies extraterritorially. Opp. 27. However, what it held was that the extraterritorial force of other provisions must be "limit[ed] ... to [their] terms," and did not somehow carry over to § 10(b). *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247, 264-65 (2010).

Respondents also resort to legislative history—in particular, the Patriot Act's insertion into RICO of various extraterritorial predicate offenses. Opp. 32-33. However, those insertions are no different in principle from the insertion of various other extraterritorial offenses into RICO by prior Congresses. And, as the dissents from denial of en banc explained, incorporation of extraterritorial predicates does not show any clear intent for "RICO *itself*" to apply extraterritorially, Pet.App. 70a (Cabranes, J.)—even as to predicates that, unlike the money-laundering and material-support predicates at issue here, apply exclusively abroad, Pet.App. 85a (Raggi, J.). Moreover, given the long criminal sentences available for terrorism-related predicate offenses, it "raises a false alarm to suggest that prosecutors will be thwarted in bringing terrorists to

justice" if RICO itself were limited to domestic conduct. Pet.App. 87a (Raggi, J.).

Respondents object that we seek to impose a "civil-criminal distinction" within RICO. Opp. 29. As to the pattern and enterprise requirements of 18 U.S.C. § 1962, we do no such thing. Rather, we simply contend that those elements must be limited to domestic patterns and enterprises. As to the injury requirement of 18 U.S.C. § 1964(c), Congress itself imposed the distinction, by requiring injury as an element of a private civil claim, but not as an element of criminal liability. Hardly a return to the maligned, open-ended "effects test," as respondents erroneously contend (Opp. 34), the requirement of a domestic injury flows directly from the role of injury as the obvious "focus" of Section 1964(c) *See Morrison*, 561 U.S. at 266.

Finally, respondents object that the requirement of a domestic injury "has no textual support" in RICO and that "this Court has consistently declined to engraft extratextual limitations upon RICO." Opp. 35. As to the latter point, this Court has held that Section 1964(c) implicitly incorporates settled background rules regarding proximate causation. *Holmes v. SIPC*, 503 U.S. 258, 267 (1992). Here, of course, there is a comparably settled background rule that statutory silence operates to confine federal statutes to "domestic, not foreign matters." *Morrison*, 561 U.S. at 255. Respondents' complaint that this is impermissibly "extratextual" amounts to nothing less than a direct attack on the presumption against extraterritoriality itself.

In short, because RICO's text is silent as to its extraterritorial force, it necessarily "has none." *See id.*

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SEPTEMBER 2015

No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act ("RICO") applies extraterritorially.

PARTIES TO THE PROCEEDING

Petitioners, who were Defendants and Appellees below, are R. J. Reynolds Tobacco Company (a North Carolina corporation), RJR Nabisco, Inc., RJR Acquisition Corp., RJR Nabisco Holdings Corp., R.J. Reynolds Tobacco Holdings, Inc., R. J. Reynolds Global Products, Inc., Reynolds American Inc., and R. J. Reynolds Tobacco Company (a New Jersey corporation).

Respondents, who were Plaintiffs and Appellants below, are the European Community, Republic of Austria, Kingdom of Belgium, Republic of Bulgaria, Republic of Cypress, Czech Republic, Kingdom of Denmark, Republic of Estonia, Republic of Finland, French Republic, Federal Republic of Germany, Hellenic Republic, Republic of Hungary, Republic of Ireland, Italian Republic, Republic of Latvia, Republic of Lithuania, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Poland, Portuguese Republic, Romania, Slovak Republic, Republic of Slovenia, Kingdom of Spain, and Kingdom of Sweden.

The corporate-disclosure statement set forth in the petition for certiorari remains accurate and complete.

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OPINIONS BELOW

The district court's opinion dismissing Respondents' RICO claims (Pet.App. 37a) appears at 2011 U.S. Dist. LEXIS 23538. The Second Circuit's opinion reversing (Pet.App. 1a) is reported at 764 F.3d 129, and its opinion denying panel rehearing (Pet.App. 55a) is reported at 764 F.3d 149. The opinions respecting the Second Circuit's denial of rehearing en banc (Pet.App. 59a) are reported at 783 F.3d 123.

JURISDICTION

The Second Circuit entered judgment on April 23, 2014. Pet.App. 1a. The panel denied rehearing and issued an amended opinion on August 20, 2014. Pet.App. 55a. The court denied rehearing en banc on April 13, 2015. Pet.App. 59a. Justice Ginsburg extended the time for filing a petition for certiorari to and including July 27, 2015, No. 15A24, and the petition was filed that date. Title 28 U.S.C. § 1254(1) confers jurisdiction.

STATUTORY PROVISIONS INVOLVED

RICO's text is set forth in the appendix hereto.

STATEMENT OF THE CASE

In *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), this Court emphatically reaffirmed the presumption that federal statutes do not apply extraterritorially, sternly admonished the Second Circuit for its disregard of that presumption, and squarely held that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. If the presumption against extraterritoriality is not rebutted, the Court further explained, the "focus" of a statute—the object of its solicitude or target of its regulation—applies only domestically. *Id.* at 266-67. Applying these principles, the Court held that § 10(b) of the Securities Exchange Act of 1934 has as its "focus" the purchase and sale of securities, lacks any clear indication of extraterritoriality, and thus applies only to domestic purchases and sales. *See id.* at 261-70. Accordingly, the Court ordered dismissal of a "foreign cubed" complaint alleging that a foreign issuer had defrauded a foreign plaintiff in connection with a foreign securities transaction. *Id.*

This case presents the question whether RICO applies extraterritorially, and if so to what extent. Despite *Morrison*'s admonition to rigorously apply the presumption against extraterritoriality, the panel below—in one fell swoop—made its own foreign-cubed expansion of RICO to cover foreign patterns of racketeering, foreign enterprises, *and* foreign injuries. It thus reinstated respondents' thrice-dismissed claims that petitioners, through alleged money laundering in Central and South America, facilitated an illegal scheme by narcotics traffickers in South America and Europe, and

caused wide-ranging harms in Europe to European governments. Whatever the precise geographic scope of RICO, it cannot possibly reach that far.

A. Statutory Background

Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. § 1961 *et seq.*). Congress found that "organized crime in the United States" is economically powerful, uses its power "to infiltrate and corrupt legitimate business[es]," and thereby threatens "the stability of the Nation's economic system." 84 Stat. at 922-23. Accordingly, the stated "purpose" of the Organized Crime Control Act was "to seek the eradication of organized crime in the United States," *id.* at 923, and RICO targeted the problem of "infiltration of legitimate businesses by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981). RICO thus addresses various ways in which organized crime can take over and manipulate businesses, labor unions, and other enterprises.

RICO's criminal prohibition, 18 U.S.C. § 1962, forbids three primary categories of conduct, each involving a "pattern of racketeering activity" used to impact an "enterprise." Section 1962(a) makes it unlawful to use or invest income from a "pattern of racketeering activity" to acquire any interest in an "enterprise." Section 1962(b) makes it unlawful to acquire or maintain any interest in an "enterprise" through a "pattern of racketeering activity." Section 1962(c) makes it unlawful to use a "pattern of racketeering activity" to conduct the affairs of an "enterprise." Finally, § 1962(d) makes it unlawful to conspire to violate any of these three prohibitions.

RICO defines the critical terms "enterprise" and "pattern of racketeering activity." A covered "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). The "enterprise" must be distinct both from the racketeering acts, *Turkette*, 452 U.S. at 583, and from the "person" who commits them, *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001).

A covered "pattern of racketeering" consists of "at least two acts of racketeering activity" committed within a ten-year period. 18 U.S.C. § 1961(5). In turn, "racketeering activity" includes (A) a series of specified crimes "chargeable under State law" and (B) "any act which is indictable under any of the following provisions of title 18," followed by a string-cite to well over 100 provisions. *Id.* § 1961(1). That list includes many predicate offenses that apply only domestically, such as mail fraud, wire fraud, and the Travel Act, *id.* §§ 1341, 1343, 1952; some predicate offenses that apply both domestically and extraterritorially, such as money laundering and providing material support to foreign terrorist organizations, *id.* §§ 1956-57, 2332b(g)(5)(B), 2339B; and a few predicate offenses that apply only extraterritorially, such as the prohibition on killing a U.S. national "outside the United States," *id.* § 2332(a).

RICO provides for a range of criminal and civil enforcement. Section 1963 imposes criminal penalties for violations of § 1962. Sections 1964(a) and (b) authorize the Attorney General to bring civil

actions to prevent and restrain violations of § 1962. Finally, § 1964(c) affords a private civil cause of action—plus treble damages and attorneys' fees—to "[a]ny person injured in his business or property by reason of a violation of section 1962."

B. Respondents' Allegations

Petitioners are the R.J. Reynolds Tobacco Company and various corporate affiliates. Respondents are the European Community ("EC") (now the European Union) and 26 of its Member States. Respondents sued petitioners under RICO; they allege that petitioners were involved in a worldwide scheme to launder the proceeds of illegal drug sales in Europe, which harmed European governments in Europe.

The alleged money-laundering scheme consisted of at least five discrete sets of transactions. First, foreign drug traffickers, located in Afghanistan, Colombia, and Russia, smuggled illegal narcotics into Europe and sold them there for Euros. Pet.App. 152a-153a. Second, the traffickers traded those Euros for other foreign currencies, in transactions with currency brokers also located in Europe. Pet.App. 153a-155a. Third, the currency brokers sold the Euros to European cigarette importers. Pet.App. 156a. Fourth, the European importers used those funds to purchase cigarettes from wholesalers. *Id.* Fifth and finally, the wholesalers in turn purchased cigarettes from petitioners, and shipped them to the importers for sale in Europe. Pet.App. 158a-159a. The wholesalers were located in such foreign countries as Colombia, Croatia, Panama, and Venezuela; and in-person sales allegedly occurred in those locales. Pet.App. 166a,

170a-171a, 174a-77a, 190a-191a. The complaint further alleges that petitioners unlawfully sold cigarettes within Iraq, in territory controlled by a foreign terrorist organization. Pet.App. 177a-181a.

The complaint alleges a single RICO "enterprise" consisting of petitioners, drug traffickers, and various "distributors, shippers, currency dealers, wholesalers, money brokers, and other participants." Pet.App. 237a-238a. It alleges a "pattern of racketeering activity" consisting of predicate acts of money laundering, mail fraud, wire fraud, Travel Act violations, and providing material support to foreign terrorist organizations. Pet.App. 238a-250a. And it alleges some 36 different injuries to European governments in Europe—including lost tax revenue, increased law-enforcement costs, various harms to their economies, and reduced sales and profits to state-owned tobacco businesses. Pet.App. 210a-227a.[1]

C. Procedural History

1. This litigation has been active for over 15 years, though the claims have never survived a motion to dismiss. The operative complaint here is the *sixth* filed by the EC in three successive cases, all based on similar factual allegations.

The first case, filed by the EC alone, was dismissed because the EC was not a proper party to complain about alleged injuries to its Member States. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 501-02 (E.D.N.Y. 2001).

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[1] Respondents also assert state-law claims, Pet.App. 262a-286a, which are not at issue here.

The second case, filed by the EC and 10 of its Member States, was dismissed because it impermissibly sought recovery for injuries allegedly suffered by foreign governments in their sovereign capacities, in violation of the revenue rule and penal-law rule. *European Cmty. v. Japan Tobacco, Inc.*, 186 F. Supp. 2d 231, 236-45 (E.D.N.Y. 2002), *aff'd sub nom. European Cmty. v. RJR Nabisco, Inc.*, 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.), *vacated*, 544 U.S. 1012 (2005), *adhered to on remand*, 424 F.3d 175 (2d Cir. 2005) (Sotomayor, J.).

The third and current case, filed by the EC and 26 of its Member States, sought to avoid dismissal under the revenue and penal-law rules by alleging competitive injuries, in the form of lost sales and profits to government-owned tobacco companies in Europe. Pet.App. 210a-214a.[2]

2. Applying *Morrison*, the district court dismissed the RICO claims as impermissibly extraterritorial. The court reasoned that because

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[2] The same plaintiffs' lawyer filed similar RICO actions alleging that virtually *every* leading manufacturer of cigarettes or liquor is engaged in a global money-laundering scheme, *each* of which has caused competitive injuries to foreign governments. Although the claims against the cigarette manufacturers repeatedly were dismissed, *see RJR Nabisco*, 355 F.3d at 127, the other defendants (including Philip Morris, British American Tobacco, and Japan Tobacco) eventually settled. The claims against the liquor manufacturers barely survived a pre-*Morrison* motion to dismiss. *Republic of Colombia v. Diageo N. Am. Inc.*, 531 F. Supp. 2d 365 (E.D.N.Y. 2007). But when the defendants sought discovery, the plaintiffs voluntarily dismissed. Stipulation and Order of Dismissal (Nov. 9, 2012), E.D.N.Y. No. 04-CV-4372 (ECF No. 351).

"RICO is silent as to any extraterritorial application," it therefore "has none." Pet.App. 44a. So the court looked to the "focus" of RICO to determine what is a permissible domestic application. Pet.App. 45a-48a. It held that, because RICO is focused on the "enterprise" corrupted by the racketeering pattern, the statute extends only to domestic enterprises. *Id.*

The court then concluded that the complaint does not allege a domestic enterprise. The court applied the "nerve center" test from *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), which looks to where the entity is controlled. Pet.App. 48a. Here, the alleged money-laundering enterprise was controlled by foreign drug traffickers, with petitioners as "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a.

3. On appeal, a Second Circuit panel reversed. As framed by the parties, the only disputed issue was what constitutes a permissible domestic application of RICO. Yet the panel, taking a different view from those expressed by the litigants and by all prior decisions, held that RICO applies extraterritorially. Its original opinion extended the substantive provisions of RICO to foreign patterns of racketeering activity and foreign enterprises, and its opinion on rehearing further extended civil RICO to foreign injuries. In sum, the court ruled that civil RICO extends to *foreign* racketeering patterns in connection with *foreign* enterprises and causing *foreign* injury.

First, the panel extended RICO to foreign racketeering patterns. It held that "RICO applies extraterritorially if, and only if, liability or guilt

could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that, by "incorporating" extraterritorial crimes "into RICO" as predicate offenses, Congress "clearly communicated its intention" that RICO itself apply extraterritorially. Pet.App. 11a.

Next, the panel extended RICO to foreign enterprises. Without citing any textual basis, the panel reasoned that limiting RICO to domestic enterprises would be "illogical," because "[s]urely the presumption against extraterritorial application ... does not command giving foreigners carte blanche to violate the laws of the United States in the United States." Pet.App. 14a.

Applying these rules, the panel held that the RICO claims alleged were viable. The panel reasoned that, because the money-laundering and material-support statutes by their terms apply extraterritorially, RICO likewise applies to extraterritorial patterns of racketeering activity predicated on violations of those statutes, even in connection with foreign enterprises. Pet.App. 17a-18a. The court acknowledged that the mail fraud, wire fraud, and Travel Act statutes do not apply extraterritorially, but it held that the complaint adequately alleged domestic violations of those statutes. Pet.App. 18a-24a.

Finally, in response to Petitioners' rehearing petition—which explained that the panel had ignored their contention that private plaintiffs seeking treble damages under § 1964(c)'s civil remedy must allege a domestic injury, regardless of the geographic reach of § 1962's criminal prohibition—the panel issued a second opinion

extending § 1964(c) to foreign injuries. It reasoned that § 1964(c) applies to any injury "'caused by predicate acts sufficiently related to constitute a pattern.'" Pet.App. 56a (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985)). And it further reasoned that the presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," not with the question whether a private right of action extends to foreign *injuries*. Pet.App. 58a. On this view, if the underlying criminal prohibition applies extraterritorially, then the private right of action necessarily follows along, regardless of where the plaintiff was injured.

4. Petitioners sought rehearing en banc. More than seven months later, the court denied it by an 8-5 vote, prompting one published concurrence and four published dissents.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, decried the panel's discovery of "a new, and potentially far-reaching, judicial interpretation" of RICO "that finds little support in the history of the statute, its implementation, or the precedents of the Supreme Court; that will encourage a new litigation industry exposing business activities abroad to civil claims of 'racketeering'; and that will invite our courts to adjudicate civil RICO claims grounded on extraterritorial activities anywhere in the world." Pet.App. 73a-74a (footnotes omitted).

Judge Raggi, writing for the same four judges, explained that the panel had opened these floodgates by misapplying both the focus and clear-indication prongs of *Morrison*. In particular, the panel made

"no identification of RICO's 'focus,' as seemingly required by *Morrison*," and instead assumed implicitly—and erroneously—that RICO's "focus" is the "individual predicate acts" alleged to comprise the "pattern" of racketeering. Pet.App. 92a-93a. Moreover, the panel further erred in supposing that "the inclusion of extraterritorially reaching crimes in the list of RICO predicates" constituted a clear indication that RICO extends even to foreign patterns of racketeering, much less to "foreign enterprises conducted through essentially foreign patterns of racketeering." Pet.App. 86a.

Judges Jacobs (Pet.App. 68a) and Lynch (Pet.App. 97a) issued separate dissents.

SUMMARY OF ARGUMENT

I. Federal statutes are presumed not to apply extraterritorially.

A. This longstanding presumption serves many important interests. It helps effectuate congressional intent, protects against unintentional international friction, and reserves for Congress delicate decisions about foreign affairs.

B. *Morrison* establishes the framework for assessing extraterritoriality issues. The first question is whether the presumption has been rebutted, which turns on whether there is a clear indication that Congress authorized extraterritorial application. The second question is whether the application involved is in fact extraterritorial, which turns on whether the "focus" of the statute is being applied domestically.

II. RICO's substantive prohibitions, 18 U.S.C. § 1962, do not reach the corruption of foreign enterprises.

A. The "focus" of these provisions is on the corruption of enterprises. RICO's title, statutory findings, and jurisdictional hook all focus on the enterprise, not on the underlying predicate acts or racketeering pattern. Its purpose and history confirm that its novel approach was to protect organizations from infiltration or corrupt influence by organized crime or other malefactors. Its three-part structure reinforces the point, by setting forth the various ways in which an enterprise may be taken over and corrupted. Finally, its civil remedies provision confirms the enterprise focus.

B. RICO contains no clear indication that it extends to the corruption of foreign enterprises. Its text is silent on whether foreign enterprises are covered, and its statutory context affirmatively suggests that it is limited to domestic enterprises. This is particularly obvious for § 1962(a) and (b), and § 1962(c) must bear the same meaning.

C. The panel erred in myriad respects. It failed entirely to identify the "focus" of RICO. Its policy arguments fall far short of establishing a clear textual indication that RICO covers foreign enterprises. And its contention that the geographic scope of the "pattern" element follows the geographic scope of the predicate statutes is entirely irrelevant to the scope of the "enterprise" element, and also wrong on its own terms.

III. RICO's private cause of action, 18 U.S.C. § 1964(c), does not reach foreign injuries.

A. The "focus" of this provision is on the private injuries caused by RICO violations. This Court has made clear that different provisions in a statute can have different foci and thus different geographic sweep. And in making the policy decision to authorize a private right of action in addition to public enforcement, Congress focused on redressing certain economic injuries flowing from RICO violations.

B. RICO's private cause of action contains no clear indication that it reaches foreign injuries. Its text is silent on whether foreign injuries are covered, and its background legal context affirmatively suggests that it is limited to domestic injuries.

C. The panel erred in holding that the presumption against extraterritoriality applies only to laws substantively regulating conduct, not those redressing injury. Numerous decisions refute that contention, and make clear that the presumption against extraterritoriality applies to all legislative provisions, including remedial and procedural ones.

IV. Under the proper legal standards, the RICO claims here must be dismissed. The complaint does not allege any domestic enterprise, instead accusing Petitioners only of facilitating a foreign enterprise that is directed and controlled by criminal gangs based in Europe, South America, and Asia. The complaint also does not adequately allege any domestic injury, instead seeking redress only for foreign harms to European governments.

ARGUMENT

The panel below simultaneously extended civil RICO to foreign *enterprises*, foreign *patterns of racketeering*, and foreign *injuries* to foreign *plaintiffs*. Moreover, while the defendants here are U.S. corporations, the ruling below applies equally to foreign *defendants*. Whatever the precise geographic scope of RICO, this extravagant and unprecedented expansion—to what is fairly described as foreign-to-the-fourth or foreign-to-the-fifth civil RICO claims—cannot possibly be right. Not surprisingly, the panel's judgment rests on several fundamental errors in applying this Court's extraterritoriality jurisprudence and in construing RICO.

Most obviously, the panel never even attempted to determine the "focus" of the substantive provisions in § 1962—despite *Morrison*'s bedrock holding that the "focus" of a statute applies only domestically absent a clear indication to the contrary. Even a cursory examination of RICO reveals that its substantive provisions "focus" on the *enterprise* impacted by the pattern of racketeering activity, not on the *predicate offenses* that constitute the pattern, despite the panel's fixation on the latter.

Moreover, in looking for a clear indication of extraterritoriality, the panel reasoned that, because certain predicate statutes apply extraterritorially, § 1962 must likewise apply to foreign patterns of such predicate offenses. As explained below, the panel's conclusion does not follow from its premise, and it conflicts with the unanimous view of other lower courts that RICO does *not* contain *any* clear indication of extraterritoriality. But, even more fundamentally, the panel's conclusion is irrelevant:

its analysis of the relationship between *predicates* and *pattern* does not even arguably suggest a clear indication that § 1962 applies to foreign *enterprises*. As to that element—the most critical in light of RICO's "focus"—the panel cited no textual indication of extraterritoriality at all (much less a clear one), but only its own views of sound policy, which are both legally irrelevant and factually misguided.

Finally, although *Morrison* expressly requires separate inquiries for different statutory provisions, the panel engaged in virtually no analysis of the geographic scope of the private right of action in § 1964(c). The "focus" of that provision is obviously the private *injuries* that Congress sought to redress, and RICO gives no hint—much less a clear indication—of application to *foreign* injuries. The panel did not dispute any of this, instead reasoning that the presumption against extraterritoriality governs only questions about conduct and simply *does not apply* to questions about injury. That assertion is conceptually unsound and doctrinally foreclosed by numerous decisions of this Court.

I. UNLESS CONGRESS CLEARLY PROVIDES OTHERWISE, FEDERAL STATUTES APPLY ONLY DOMESTICALLY

"It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1941)). Thus, "[w]hen a statute has no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255. As this Court

reaffirmed in *Morrison* and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the presumption serves vital interests and has real force.

A. The Presumption Against Extraterritoriality Serves Many Important Purposes

The presumption against extraterritoriality "represents a canon of construction ... rather than a limit upon Congress's power to legislate." *Morrison*, 561 U.S. at 255. It is "rooted in a number of considerations." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993).

First, the presumption reflects the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Id.*; *see also Foley Bros.*, 336 U.S. at 285. Because Congress's basic duty is to legislate for this Nation, not the world at large, silence as to extraterritorial force of a statue is most naturally construed as an implied limitation to domestic affairs. Thus, where Congress does not "clearly express[]" an "affirmative intention" that a statute apply abroad, *Aramco*, 499 U.S. at 248, the presumption simply "ascertain[s]" the "unexpressed congressional intent" that the law should not so apply, *Foley Bros.*, 336 U.S. at 285, and thus reflects the commonsense "notion that some things 'go without saying,'" *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014).

Second, the presumption "'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248); *see also Morrison*,

561 U.S. at 255; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993). Applying U.S. law abroad "not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent." *N.Y. Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 32 (1925) (quoting *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909)). Other countries—including European states who are parties here—have long "resented and protested" the perceived "excessive intrusions into their own spheres" of U.S. legislation. *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*, 549 F.2d 597, 609 (9th Cir. 1976); *see also, e.g.*, Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction—European Responses*, 26 HOUS. J. INT'L L. 309, 315-16 (2004). Presuming that U.S. law "governs domestically but does not rule the world" thus fosters international comity in addition to effectuating Congress's likely intent. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

Finally, the presumption respects Congress's unique role in the "delicate field of international relations." *Kiobel*, 133 S. Ct. at 1664 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). "[Congress] alone has the facilities necessary" to make the "important policy decision[s]" whether or to what extent to export U.S. law across the globe. *Benz*, 353 U.S. at 147. And, in doing so, Congress is "able to calibrate its provisions in a way that [courts] cannot." *Aramco*, 499 U.S. at 259. A clear presumption thus "preserve[s] a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. at 261.

And a presumption *against* extraterritoriality "helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign-policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664.

B. The Presumption Requires Congress To Provide A "Clear Indication" That A Statute's "Focus" Extends Extra-territorially

While the presumption has existed for nearly as long as Congress has legislated, *Morrison* offered important clarifications about its application. Strongly reaffirming the presumption and rejecting the Second Circuit's disregard of it, *Morrison* framed two critical questions. *First*, has the presumption against extraterritoriality been rebutted? *Second*, as important, what counts as an "extraterritorial" application of the statute involved?

1. To determine whether the presumption has been rebutted, courts must consider whether the statutory text or structure reveals a "clear indication of an extraterritorial application." *Morrison*, 561 U.S. at 255. Countless statutes show that Congress knows how "to make a clear statement that a statute applies overseas" when it wants to. *Aramco*, 499 U.S. at 258 (collecting examples). But absent such "a clear indication" of extraterritoriality, a statute "has none." *Morrison*, 561 U.S. at 255.

Because *Morrison* held that the presumption was not rebutted as to § 10(b) of the Securities Exchange Act of 1934, *see id.* at 262-65, the case is especially instructive on what statutory features do *not* count as a "clear indication" of extraterritoriality.

First, because a party asserting extra-territoriality must identify "specific language" that "speak[s] directly" to that question, *Aramco*, 499 U.S. at 250, 252, merely "possible interpretations of statutory language" do not suffice. *Morrison*, 561 U.S. at 264; *see also Aramco*, 499 U.S. at 253 (presumption not rebutted by "possible, or even plausible, interpretations"); *Sale*, 509 U.S. at 176 ("it is possible" that statutory amendment "removed any territorial limitation," but that "possibility" is "not a substitute" for "affirmative evidence of intended extraterritorial application").

Second, general terms that could be interpreted to subsume extraterritorial application do not suffice. For example, a "general reference to foreign commerce" in a jurisdictional hook does not defeat the presumption. *Morrison*, 561 U.S. at 263; *see also Aramco*, 499 U.S. at 251-52 (presumption not rebutted by "statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce'"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 15 n.3, 19-20 (1963). Congress may assert legislative jurisdiction based on impacts on foreign commerce, but that does not clearly establish an intent to make federal law extraterritorial. The reason is plain: even domestic entities or conduct can affect "foreign commerce," and so Congress's invocation of its foreign-commerce power does not clearly indicate an intent to regulate extraterritorially.

Similarly, "it is well-established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665. Thus, a conferral of jurisdiction over

"*any* civil action" does not "suggest application to torts committed abroad." *Id.* Likewise, a statutory reference to "[e]very contract made to which the United States ... is a party" does not apply to contracts under which American citizens worked for the United States in foreign countries. *Foley Bros.*, 336 U.S. at 282, 287-88; *see also Small v. United States*, 544 U.S. 385, 388 (2005) ("convicted in any court" does not include convictions in foreign courts).

Finally, even when Congress provides a clear statement of *some* extraterritorial application, the presumption "'operates to limit that provision to its terms.'" *Kiobel*, 133 S. Ct. at 1667 (quoting *Morrison*, 561 U.S. at 265); *see also Microsoft*, 550 U.S. at 456 (presumption "remains instructive in determining the *extent* of the statutory exception"). For instance, although § 30(a) of the Exchange Act expressly applies to transactions outside the U.S., that does not establish that the "rest of the Exchange Act" also has such application; to the contrary, the contrast between the clarity of § 30(a) and the silence of the Act's other provisions suggests just the opposite. *See Morrison*, 561 U.S. at 265.

2. *Morrison* also clarifies how to distinguish between domestic and extraterritorial applications of a statute. That is important because, after all, "it is a rare case of prohibited extraterritorial application that lacks *all* contact with the territory of the United States." *Id.* at 266. And the presumption "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." *Id.* The question thus arises: What sort of contact makes application of the statute "domestic" or "extraterritorial"?

Morrison answered that courts must look to "the 'focus' of congressional concern," defined by what "the statute seeks to regulate," or "the objects of the statute's solicitude." *Id.* at 266-67 (quoting *Aramco*, 499 U.S. at 255). Where the matters that were Congress's "focus" all occur domestically, the contested application is domestic even if other foreign contacts are present, and thus the presumption against extraterritoriality does not arise. *See Pasquantino v. United States*, 544 U.S. 349, 371 (2005). Conversely, where a matter that was Congress's "focus" occurs abroad, applying the statute is extraterritorial, even if other domestic contacts are present. *Morrison*, 561 U.S. at 266. Accordingly, *Morrison* rejected the more expansive "conduct" and "effects" tests, under which a statute could apply "domestically" if any "significant conduct" or "significant effect" occurred in the U.S., regardless of whether the conduct or effect matched the "focus" of the statute or the claims of the plaintiff. *Id.* at 258. The Second Circuit had developed those tests to determine "what Congress would have wanted if it had thought of the situation before the court," but this Court repudiated such "judicial speculation" and its "unpredictable and inconsistent" results. *Id.* at 255, 260-61. Rather, *Morrison* held, application of a statute is domestic only where the domestic contacts match the statutory focus. *See id.* at 267.

Applying this framework, *Morrison* held that § 10(b) of the Exchange Act does not apply to deception in connection with foreign securities transactions—even if the deceptive acts occur in the U.S. The Court explained that the "focus" of § 10(b)

is on "purchases and sales of securities," and the presumption therefore limits that provision to *domestic* securities transactions. 561 U.S. at 266-67. The existence of deception in the U.S. is thus insufficient to make application of § 10(b) domestic: the focus of § 10(b) is deception "in connection with" securities transactions, not deception *"simpliciter,"* and so "where the deception originated" is not controlling. *Id.* at 266, 271-72.

Prior cases have used similar reasoning. For example, *Aramco* held that Title VII does not apply to "employment practices of United States employers who employ United States citizens abroad." 499 U.S. at 246-47. And *Aramco* so held even though the employee was also hired in the U.S. *Id.* As the Court explained, Title VII's "focus" is not the nationality of either the employer or the employee. *See id.* at 255. Instead, Title VII's "focus" is employment, and thus the presumption limits the statute to domestic employment. *Id.* at 255-56. And because the specific claims involved did not challenge the domestic hiring, but rather subsequent harassment and discharge that occurred abroad, Title VII was inapplicable. *Id.* at 247-49, 259.[3] Similarly, in *Foley Brothers*, this Court held that a maximum-hours law did not apply to work performed abroad by an American under a contract

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[3] Congress subsequently amended Title VII to extend protection to U.S. citizens, but not foreign citizens, working overseas. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512 n.8 (2006). This confirms that "Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications." *Morrison*, 561 U.S. at 265 n.8.

with the U.S. 336 U.S. at 281. Again, Congress's focus was on "labor conditions," so the presumption limited the statute to "domestic" labor conditions, *id.* at 286, and thus the nationality of neither the employee nor the employer sufficed to make the contested application domestic. *See id.* at 282-83.

Numerous other cases confirm the basic principle that, absent a clear contrary indication, a statute applies only where domestic contacts match its focus. *E.g.*, *Sale*, 509 U.S. at 177 (provision of Immigration and Nationality Act applies to "domestic procedures by which the Attorney General determines whether deportable and excludable aliens may remain in the United States," not to Coast Guard actions on high seas); *Benz*, 353 U.S. at 143-44 (Labor Management Relations Act applies to "industrial strife between American employers and employees," not to "labor disputes between nationals of other countries operating ships" in U.S. waters); *Chisholm*, 265 U.S. at 31-32 (Federal Employers' Liability Act applies to injuries occurring in the U.S., not to Americans injured on American railroads in other countries). Domestic contacts beyond the statutory focus do not make application of the statute "domestic."

* * *

In sum, under the presumption against extraterritoriality, courts must determine the "focus" of the federal statute involved and must limit it to domestic applications unless Congress provides a "clear indication" that foreign applications are covered too.

II. RICO DOES NOT REACH CORRUPTION OF FOREIGN ENTERPRISES

The panel below misapplied these extra-territoriality principles to RICO in general, and to § 1962 in particular. Without any consideration of the statute's "focus," the panel reasoned that because some of RICO's predicate statutes apply extraterritorially, a RICO "pattern" must apply extraterritorially to the same extent. Pet.App. 9a-13a. Then, despite admitting that RICO is silent as to the "geographic scope of the enterprise," the panel separately extended § 1962 to foreign enterprises, based on its view that there would otherwise be "illogical" gaps in the statute's coverage. Pet.App. 13a-15a. To best expose the errors in this reasoning, we address *Morrison*'s two steps in reverse order.

As to step two, the text, purpose, structure, and remedies of RICO all demonstrate that the "focus" of § 1962 is not on the underlying predicate statutes incorporated into RICO, but on the corruption of enterprises. As explained by Judge Rakoff—who literally wrote the book on RICO, *see* J. Rakoff & H. Goldstein, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY (2015)—RICO is "not a recidivist statute" further punishing repeated predicate offenses, but rather an innovative prohibition targeting the use of a pattern of racketeering "to impact an enterprise." *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010). Accordingly, it is the enterprise that must be domestic, absent a clear indication that Congress intended to protect foreign enterprises.

As to step one, with the relevant "focus" of § 1962 in mind, the panel's analysis of textual indications falls apart. Its conclusion that a RICO "pattern"

extends extraterritorially with the predicate statutes is wrong on its own terms—and inconsistent with an otherwise unanimous body of precedent recognizing that RICO itself, as opposed to its predicate statutes, contains no clear indication of extraterritoriality. More fundamentally, the panel's analysis addresses entirely the wrong question: the geographic scope of the "pattern," rather than the geographic scope of the "enterprise." As to the latter question, there is no textual indication at all, much less any clear indication, that § 1962 applies extraterritorially to criminalize the corruption of foreign enterprises. Accordingly, § 1962 applies only to domestic enterprises.

A. The "Focus" Of RICO's Substantive Prohibitions Is On The Corruption Of Enterprises

Congress enacted RICO to address the serious threat of "organized crime in the United States." 84 Stat. at 922; *see Turkette*, 452 U.S. at 588-93. "Earlier steps to combat organized crime" had failed, largely because existing laws "targeted individuals engaged in racketeering activity," rather than the ways in which organized crime perpetuated itself by infiltrating and exerting corrupt influence over other organizations. *Alexander v. United States*, 509 U.S. 544, 561 (1993) (Kennedy, J. dissenting).

In RICO, Congress sought to remedy that flaw. Its novel approach was to target not the underlying racketeering, but the corrupt infiltration and control of businesses, labor unions, and other distinct enterprises. Structurally, the statute incorporates a wide swath of "racketeering" offenses already illegal under state and federal law—including "murder,

kidnapping, gambling, arson, robbery, bribery, extortion," and other offenses commonly used by organized crime. 18 U.S.C. § 1961(1). Section 1962 then makes it a new, separate felony to engage in a "pattern" of such activity as a means to infiltrate, acquire, or operate an "enterprise," *id.* § 1962, broadly defined to include any sort of organized entity, *id.* § 1961(4).

RICO's innovation was therefore to focus on how organized crime would corrupt "enterprises." *See generally* Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661 (1987). That focus—and the subordinate or "predicate" role of the racketeering acts typically associated with organized crime—is reflected in the text, structure, history, and remedies of RICO, as well as this Court's precedents. Together, these indicia firmly show that the object of Congress's solicitude was the enterprise, and corruption of the enterprise was its focus. Judge Rakoff was thus correct to conclude that "the focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity." *Cedeño*, 733 F. Supp. 2d at 474.

1. To start, RICO's text repeatedly shows a focus on enterprise corruption, rather than the underlying predicate acts of racketeering.

First, the title of the statute, the "Racketeer Influenced and Corrupt *Organizations* Act," reveals an emphasis on the affected organization—or, in statutory parlance, the "enterprise." Moreover, RICO's title suggests that racketeering matters only insofar as it "influence[s]" or "corrupt[s]" the affected organization. If the predicate crimes had been the statutory focus of RICO, one would expect the

statute to have been called the Anti-Racketeering Act, the Combating Patterns of Racketeering Act, or, less hypothetically, a statute prohibiting "[v]iolent crimes in aid of racketeering activity" (18 U.S.C. § 1959). Instead, the enterprise was the "object[] of the statute's solicitude." *Morrison*, 561 U.S. at 267.[4]

Second, RICO includes a statement of findings and purpose, which repeatedly has informed its interpretation. *See, e.g.*, *Turkette*, 452 U.S. at 588; *Russello v. United States*, 464 U.S. 16, 26-27 (1983); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in judgment). In that statement, Congress identified as its principal concern the fact that "organized crime" uses its "money and power" "to infiltrate and corrupt legitimate business and labor unions." 84 Stat. at 922-23. Echoing RICO's title, this reference confirms the statutory focus on enterprise corruption.

Third, the text of § 1962 identifies the "enterprise" as the basis for Congress's exercise of legislative power. Specifically, § 1962(a), (b), and (c) all advert to Congress's power to regulate interstate and foreign commerce by reference, not to *racketeering acts* that affect commerce, but rather to *enterprises* that "affect" or are "engaged in" commerce. Thus, what Congress "seeks to regulate" under the Commerce Clause (*Morrison*, 561 U.S. at 267) is the enterprise, not the racketeering.

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[4] Notably, § 1959(a)(1) prohibits contracting with an enterprise engaged in racketeering activity to commit murder, kidnapping, or other predicate "[v]iolent crimes." It provides a striking example of a predicate-focused racketeering statute—and a striking contrast to RICO's text and structure.

Moreover, Congress *could not* have sought to regulate the "racketeering activity" as such, because that term is defined to include a host of "State law" offenses like "murder" and "arson," unconnected to any impact on interstate or foreign commerce. *Id.* § 1961(1)(A). Yet, as this Court repeatedly has held, the Commerce Clause does not confer "a general police power" broad enough to reach such local offenses. *United States v. Lopez*, 514 U.S. 549, 567 (1995). To be constitutional, § 1962 must be read to focus on regulating *enterprises* that are "engaged in" or "affect" interstate commerce, rather than on federalizing a slew of disparate state-law crimes, many of them purely local.

2. Beyond these textual indications, this Court often has observed that RICO's "major purpose" was "to address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591; *see also H.J.*, 492 U.S. at 245 (RICO "focused on ... predations of mobsters"); *Russello*, 464 U.S. at 28 (RICO targeted "economic roots" of "organized crime" and its "corrupting influence" in "channels of commerce"). This was the specific problem that Congress thought would "weaken the stability of the Nation's economic system." 84 Stat. at 923; *see* S. Rep. No. 91-617, at 79 (1969) (describing infiltration of legitimate businesses as posing "a serious threat to the economic well-being of the Nation").

RICO's statutory history confirms this objective. When the "basic structure" of RICO "took shape," the bill was "directed solely at the investment of proceeds derived from criminal activity." *Reves v. Ernst & Young*, 507 U.S. 170, 180 (1993). That provision ultimately became § 1962(a), which, as

discussed below, is manifestly focused on the infiltration of enterprises. Although the bill later took on a broader scope, its "emphasis on infiltration of legitimate organizations remained as [it] made its way through the legislative process." Lynch, *supra*, at 678. Ultimately, "[b]oth the Senate and House committee reports accompanying the final versions of the [bill] state[d] that the purpose of RICO is 'the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'" *Id.* at 678 & n.83 (quoting S. Rep. No. 91-617; H.R. Rep. No. 91-1549 (1970)); *see also Turkette*, 452 U.S. at 591-92 & nn.13-14.

3. The "three-part" structure of § 1962 (*Reves*, 507 U.S. at 182-83) confirms its focus on enterprise corruption. In particular, the statutory structure tracks the various ways organized crime typically co-opts and controls businesses, unions, and other enterprises. By contrast, the subordinate role of the predicate racketeering acts in the overall scheme indicates that those disparate offenses are not the focus of RICO in general or § 1962 in particular.

RICO's primary substantive prohibitions are set forth in § 1962(a), (b), and (c). The first two of these address ways in which organized crime typically gains a foothold in an enterprise, either by using proceeds from a pattern of racketeering activity to "invest" in the enterprise, 18 U.S.C. § 1962(a), or by employing a pattern of racketeering activity to "acquire" an "interest" in the enterprise, *id.* § 1962(b). The third provision prohibits what typically happens once organized crime acquires control of an enterprise—"conduct" of its affairs through a pattern of racketeering activity. *Id.*

§ 1962(c). The statute thus criminalizes each step in "the infiltration [and] management of legitimate organizations by racketeering activity." *Reves*, 507 U.S. at 181 (emphasis omitted). Under all three provisions, it is the *corrupting influence on the enterprise* that is ultimately the touchstone for RICO liability; that is the common focus of § 1962.

Moreover, in none of these provisions does the enterprise play the role of the perpetrator. Rather, the enterprise must be "distinct" from the "person" who commits the racketeering, *Cedric Kushner*, 533 U.S. at 161, and must also exist "separate and apart" from the pattern of racketeering activity, *Turkette*, 452 U.S. at 583. The statute thus contemplates a defendant who exerts the corrupting influence, with the enterprise serving either as the "victim" of racketeering (under § 1962(a) and (b)) or the "vehicle" through which racketeering is perpetrated (under § 1962(c)). *See, e.g.*, *Cedric Kushner*, 533 U.S. at 164; *NOW v. Scheidler*, 510 U.S. 249, 259 (1994). Either way, the statutory objective is to prevent enterprise corruption.

Although each provision of § 1962 also requires a pattern of racketeering activity, the statutory structure reveals the subordinate role of the pattern—and certainly of the underlying predicate offenses—in the overall scheme. In fact, "racketeering activity" consists entirely of offenses that are *independently illegal* under separate provisions of state and federal law. 18 U.S.C. § 1961(1) (defining "racketeering activity" as certain offenses "chargeable under state law" or "indictable under" federal law). By definition, every racketeering predicate is thus the focus of *another*

criminal prohibition. These predicates are not the focus of § 1962, in part because they do not need to be. Closer examination of § 1962's three subparts reinforces these points.

Section 1962(a) prohibits the use of racketeering "income" or "proceeds" to "invest" in an enterprise. Tellingly, that prohibition contains an exception for small investments that involve the purchase of less than one percent of a company's shares and do not confer "the power to elect one or more directors." The exception is thus keyed to the *de minimis* nature of the investment, not to the relative seriousness of the underlying racketeering activity. For example, the exemption applies to small investments of proceeds from a pattern of murder, but not to large investments of proceeds from a pattern of fraud in connection with a bankruptcy case (18 U.S.C. § 1961(1)(D)). The exception makes perfect sense because § 1962(a) focuses on investment in an enterprise, but would be capricious if the provision were instead focused on the underlying racketeering.

Section 1962(b) prohibits racketeering used to "acquire or maintain" an "interest" in an enterprise. Again, the statutory objective is clear: preventing organized crime, not from engaging in racketeering activity as such, but from doing so in order to gain sway over businesses, unions, and other enterprises. The prohibition does not target stand-alone patterns of racketeering, which would have been the obvious approach had the statute focused on racketeering *simpliciter*.

Section 1962(c) makes it unlawful "to conduct or participate ... in the conduct of [an] enterprise's affairs through a pattern of racketeering activity."

As this Court has explained, to "conduct" or "participate in" the "conduct of" an enterprise requires playing some role in "directing the enterprise's affairs." *Reves*, 507 U.S. at 178; *see also Boyle v. United States*, 556 U.S. 938, 945 n.3 (2009) (citing "requirement that [the] enterprise must be 'directed'" by the defendant). Again, the touchstone of criminal liability is not whether the defendant engaged in racketeering, but whether he exerted a corrupting influence *on the enterprise* by directing its affairs through racketeering.

Of course, RICO by its terms "encompasses both legitimate and illegitimate enterprises." *Turkette*, 452 U.S. at 578. Although "the primary purpose of RICO is to cope with the infiltration of legitimate businesses," the statute also extends to organizations with "no legitimate dimension." *Id.* at 591; *see* 18 U.S.C. § 1961(4) (defining enterprise to include any "group of individuals associated in fact"). Yet, "whether the enterprise be ostensibly legitimate or admittedly criminal," *Turkette*, 452 U.S. at 585, abuse of the "enterprise" remains the clear focus of the statute. Where the enterprise is legitimate, RICO "protects [it] from those who would use unlawful acts to victimize it"; where the enterprise was corrupt from the start, RICO forbids using it "as a 'vehicle'" through which to commit further crime. *Cedric Kushner*, 533 U.S. at 164. Both are forms of enterprise corruption, and while Congress primarily contemplated the former, it drafted broadly enough to cover the latter too. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils").

Ultimately, though, the critical point is that RICO does not target racketeering alone, but only insofar as it is used to influence a distinct "enterprise."

Morrison itself is highly parallel. There, § 10(b) "punishe[d] not all acts of deception, but only such acts 'in connection with the purchase or sale of any security.'" 561 U.S. at 272. As this Court explained, the "focus" of § 10(b) accordingly was not the wrongful conduct—the "acts of deception" or fraud "*simpliciter*"—but rather the securities transactions whose integrity was at risk from the use of deception "in connection" therewith. *Id.* at 266-67, 272. In just the same way, RICO does not punish racketeering activity alone, or even patterns of racketeering activity alone, but only such patterns "in connection with" the corruption of an "enterprise." *Sedima*, 473 U.S. at 497. Accordingly, the "focus" of § 1962 is not the racketeering *simpliciter*, but rather the enterprises whose integrity it threatens.

4. In two respects, RICO's civil remedies confirm that § 1962 focuses on enterprise corruption.

First, § 1964(a) sets forth in enterprise-focused terms the injunctive relief available to the government in civil enforcement actions. It provides for injunctions ordering the divestiture "of any interest, direct or indirect, in any enterprise"; injunctions "ordering dissolution or reorganization of any enterprise"; and injunctions "imposing reasonable restrictions on the future activities or investments of any person." But it does not provide for injunctions against the commission of future racketeering acts—a strange omission if such acts were the focus of § 1962.

Second, § 1964(c) affords a private right of action for "any person injured in his business or property," but does not extend to personal injuries. The economic focus of § 1964(c) makes perfect sense given the focus of § 1962 on the corruption of enterprises, but would make little sense if the focus of § 1962 were on racketeering activity as such. In the latter case, it would be strange to afford a civil remedy to the owner of a building destroyed by predicate acts of terrorism, but not to a person injured by the same acts. Likewise, the first and most serious predicate crime defined as "racketeering activity" under RICO is murder, and a private right of action for an injury to "business or property" arising from a pattern of murder borders on the nonsensical.

* * *

In sum, the indisputable focus of § 1962 is on preventing the corruption of enterprises, not on the predicate acts already criminalized by other statutes.

B. There is No Clear Indication That RICO's Substantive Provisions Extend To The Corruption of Foreign Enterprises

Because the focus of § 1962 is on preventing the corruption of enterprises, the presumption against extraterritoriality limits that provision to domestic enterprises, absent a clear indication that Congress intended also to cover foreign enterprises. RICO contains no such clear indication. To the contrary, it affirmatively suggests that Congress was concerned only about preventing the infiltration, acquisition, and operation of domestic enterprises, not about preserving the integrity of foreign enterprises.

1. Nothing in RICO suggests that § 1962 prohibits using the proceeds from a pattern of racketeering to invest in a *foreign* enterprise, using a pattern of racketeering to acquire a *foreign* enterprise, or conducting the affairs of a *foreign* enterprise through a pattern of racketeering.

To begin, RICO's definition of "enterprise" is silent on its own application to foreign enterprises. RICO defines the term "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). That definition makes no reference to geographic parameters. Moreover, while it does use the word "any," this Court repeatedly has held that "generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665; *see also Small*, 544 U.S. at 388; *Foley Bros.*, 336 U.S. at 287-88. Silence on the specific issue of territorial scope is thus construed as an implicit domestic limitation on the focus—here, the enterprise element. And this particular silence, in RICO's definitional provision, is particularly notable because a definitional provision in the federal antitrust laws—on which RICO was modeled in part, *see Holmes v. SIPC*, 503 U.S. 258, 267 (1992)—extends those laws to foreign enterprises. 15 U.S.C. § 7 (defining "person" for antitrust purposes "to include corporations and associations existing under or authorized by ... the laws of any foreign country").

Moreover, RICO's substantive provisions are also silent on the geographic scope of the covered enterprises. The only "foreign" references there—or

anywhere else in the statute—are the references to enterprises that engage in or affect "interstate or foreign commerce." 18 U.S.C. § 1962(a), (b), (c). But, again, this Court repeatedly has held that such jurisdictional references to "foreign commerce" establish nothing about substantive territorial scope: "statutes that contain broad language in their definitions of 'commerce' that expressly refer to '*foreign* commerce' do not" defeat the presumption. *Aramco*, 499 U.S. at 251-52; *see also Morrison*, 561 U.S. at 263; *Chisholm*, 268 U.S. at 30-31.

2. Far from establishing any clear indication that § 1962 extends to foreign enterprises, the text of RICO suggests just the opposite.

RICO's statutory findings and purpose are particularly instructive. In enacting RICO, Congress specifically found that "organized crime in the United States is [] highly sophisticated," that it uses its considerable economic power "to infiltrate and corrupt legitimate businesses and labor unions," that these "activities in the United States" both "weaken the stability of the Nation's economic system" and "undermine the general welfare of the Nation and its citizens," and that the "purpose" of RICO was thus "to seek the eradication of organized crime in the United States." 84 Stat. at 922-23. These various statements establish not only a focus on enterprises, but also a particular concern for *domestic* enterprises. They are squarely implicated by the infiltration of a business or union in Boston, but not by similar infiltrations in Berlin or Bogotá.

This statutory concern—to prevent the corruption of domestic enterprises—is particularly obvious as to § 1962(a) and (b). After all, it is

implausible that Congress would be concerned with corrupting investments in, or acquisitions of, foreign enterprises. Even for § 1962(c), Congress's concern does not clearly extend to foreign enterprises, as explained further below (*infra* at 38-40). And regardless, the implausibility of extending the first two subsections to foreign enterprises counsels strongly against so extending the third. Identical terms used in different parts of a statute presumptively "have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). That principle applies with particular force here, where the words at issue appear in three consecutive subsections of a single statutory provision, in what is obviously a deliberately sequenced "three-part structure" (*Reves*, 507 U.S. at 182-83). Moreover, "enterprise" is a defined term in RICO and thus either sweeps in foreign enterprises or not. It cannot be a "chameleon" with "different meaning" in different applications. *Clark v. Martinez*, 543 U.S. 371, 378, 382 (2005).

Finally, RICO's criminal remedies further cut against extending § 1962 to foreign enterprises. Section 1963(a)(2) requires forfeiture of any interest in "any enterprise" acquired or controlled in violation of § 1962. If the statute swept in foreign enterprises, it would thus require forfeiture of *foreign entities* to the U.S. government. *See Alexander*, 509 U.S. at 574 (Kennedy, J., dissenting) (noting that defendant forfeits "entire interest in the enterprise involved in the RICO violations"). The oddity of such a result confirms that Congress did not extend RICO to foreign enterprises. Moreover, RICO makes clear that the forfeiture applies "irrespective of any

provision of State Law." 18 U.S.C. § 1963(a)(2). Had Congress intended to provide for the forfeiture of foreign enterprises, the proviso presumably would have clarified that the forfeiture applies "irrespective of any provision of state *or foreign* law."

* * *

In sum, nothing in RICO remotely establishes a clear indication that § 1962 extends to foreign enterprises, and thus it is limited to domestic enterprises.

C. The Panel's Contrary Arguments Are Flawed

The panel did not engage at all on the question of what constitutes the "focus" of either RICO in general or § 1962 in particular. Instead, it simply reasoned that limiting RICO to domestic enterprises would be "illogical" (Pet.App. 13a-15a) and that extraterritorial predicate statutes constitute a clear indication of extraterritorial patterns (Pet.App. 9a-14a). This was error at every level.

1. As to enterprises, the panel conceded that "RICO does not qualify the geographic scope of the enterprise." Pet.App. 13a. Under the presumption against extraterritoriality, that alone should have been dispositive, given that the "enterprise" is clearly the focus of § 1962. Moreover, the panel also ignored the implausibility of construing § 1962(a) and (b) to reach investments in, or acquisitions of, foreign enterprises. That problem is also virtually dispositive, because the defined term "enterprise" cannot mean "domestic enterprise" in § 1962(a) and (b), but "foreign enterprise" in the immediately adjoining § 1962(c).

Nevertheless, fixating solely on the impact of limiting § 1962(c) to domestic enterprises, the panel reasoned that it "seems to us illogical" that a foreign enterprise could "sen[d] emissaries" to commit domestic racketeering activity, such that "foreigners [had] carte blanche to violate the laws of the United States in the United States." Pet.App. 14a. That analysis misperceives the operation of § 1962(c), under which the "person" directs the "enterprise," rather than vice versa. *See Reves*, 507 U.S. at 178-79. More fundamentally, it both misapplies *Morrison* and misunderstands the implications of limiting RICO to domestic enterprises.

As for *Morrison*, speculation about what "seems to us illogical" does not remotely suffice to displace the presumption against extraterritoriality. That requires a "clear indication" in statutory text or context, not a policy argument about the supposed desirability of extraterritorial application. *See Morrison*, 561 U.S. at 255. Moreover, *Morrison* itself held that § 10(b) of the Exchange Act does not proscribe domestic deception "in connection with" a *foreign* securities transition, as the latter was the focus of the statute. *Id.* at 266, 271-72.

Anyway, contrary to the panel's claim, limiting RICO to domestic enterprises hardly gives foreign persons or enterprises "carte blanche" to commit serious crimes in the U.S. Pet.App. 14a. For one thing, *any* RICO predicate offense—whether in connection with a domestic enterprise, a foreign enterprise, or no enterprise at all—can be the subject of a criminal prosecution under the predicate statute. For another, as Judge Raggi noted, many of the predicate statutes impose penalties that are equally

or even "more ... severe" than those available under RICO (which provides no mandatory minimum sentence, and generally provides a maximum sentence of only 20 years, *see* 18 U.S.C. § 1963(a)). Pet.App. 86a (dissenting from denial of en banc); *see, e.g.*, 18 U.S.C. § 1583 (human trafficking punishable by 20 years to life); *id.* § 2260 (sexual exploitation of children punishable by 30 years, or 50 years for repeat offenders). And, of course, that is particularly true for the murder-based examples conjured by the panel (Pet.App. 14a) and the terrorism-based examples conjured by Judge Hall on rehearing (Pet.App. 61a-62a). *See, e.g.*, 18 U.S.C. § 1958 (murder-for-hire punishable by death); *id.* § 2332b(g)(5) (terrorism-related federal offenses, some punishable by death). Thus, as Judge Raggi explained, "it raises a false alarm to suggest that prosecutors will be thwarted in bringing terrorists to justice unless we recognize RICO to extend extraterritorially to foreign enterprises conducted through foreign patterns of racketeering upon the pleading of any extraterritorial-crime predicate." Pet.App. 87a (dissenting from denial of en banc).

In any event, the panel's foreign "emissaries" hypothetical likely could be reached under RICO as well, by charging a distinct domestic enterprise. "[A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose." *Boyle*, 556 U.S. at 948. The "emissaries" imagined by the panel likely would themselves constitute a domestic association-in-fact "enterprise." And the ringleaders of that "enterprise" likely would violate § 1962(c), by conducting its affairs through a "pattern of racketeering activity."

2. As to patterns, the panel noted that some RICO predicate statutes can apply extraterritorially, and a few apply only extraterritorially. Pet.App. 9a-11a. From this, the panel concluded that "RICO applies extraterritorially if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicate." Pet.App. 9a. The panel reasoned that Congress, by "incorporating" these predicate statutes into RICO, "clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." Pet.App. 11a. There are at least two critical flaws with that reasoning.

First, and most fundamentally, the panel's analysis addresses the wrong question. Because § 1962's "focus" is on corruption of the "enterprise," the relevant question is not whether the predicate statutes or even the "pattern" element exhibit a clear indication of extraterritorial application, but whether the "enterprise" element does so. The panel's analysis at most suggests that the foreign reach of the *predicate statutes* implies that RICO extends to foreign *patterns*. After all, Congress did not incorporate the predicate statutes into RICO in the abstract. Rather, it incorporated them into a statutory definition of "racketeering activity," 18 U.S.C. § 1961(1), and then incorporated that definition into the further statutory definition of "pattern of racketeering activity," *id.* § 1961(5). This precise chain of incorporation in no way suggests that RICO extends to foreign *enterprises*. Instead, it suggests that such foreign patterns are covered in connection with *domestic* enterprises.

Indeed, if the panel were correct that Congress addressed the territorial scope of the "pattern" element, but remained silent on the territorial scope of the "enterprise" element, that premise would undermine—not advance—the conclusion that RICO extends to foreign enterprises. Congress's purported incorporation of extraterritoriality language into the definition of "pattern," and its omission of such language from the nearby definition of "enterprise," would strongly suggest that the omission was intentional. *See, e.g.*, *Russello*, 464 U.S. at 23; *see also Morrison*, 561 U.S. at 265 ("Section 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect.").

Second, even on its own terms, the panel's analysis does not establish a clear textual indication to extend RICO to foreign patterns of racketeering. That is unsurprising, as *every* court to address the issue since *Morrison*—except for the panel below—has concluded that RICO itself contains no clear indication of its own extraterritoriality. Pet. 16-18. Neither the "pattern" definition, 18 U.S.C. § 1961(5), nor even the definition of "racketeering activity," *id.* § 1961(1), says anything about extraterritoriality. To be sure, the latter definition does incorporate "any act which is indictable" under various enumerated federal statutes, some of which themselves apply extraterritorially. *See id.* Again, however, "it is well-established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." *Kiobel*, 133 S. Ct. at 1665.

The panel reasoned that the incorporation of extraterritorial predicate statutes into RICO would serve no purpose if the "pattern" element applied

only domestically. That is incorrect. As to predicate statutes that cover *both* foreign and domestic conduct, Congress could have meaningfully incorporated them solely for their domestic applications. And even as to the predicate statutes that cover *only* foreign conduct, Congress could have meaningfully incorporated them solely for when such offenses are part of a broader pattern whose overall locus is domestic. Pet.App. 85a (Raggi, J., dissenting from denial of en banc). Since these interpretations are "possible," it was error for the panel to "override the presumption against extraterritoriality" by extending RICO to wholly foreign patterns. *Morrison*, 561 U.S. at 264. In any event, even if RICO's "pattern" element did extend to foreign patterns involving the very few *exclusively* extraterritorial predicate offenses (none of which is involved here), that would hardly show that the "pattern" element also extends to foreign patterns involving predicate offenses under statutes that are *not* exclusively extraterritorial. *See, e.g.*, *Morrison*, 561 U.S. at 265 (presumption "operate[s] to limit [extraterritorial] provision[s] to [their] terms"); *Microsoft*, 550 U.S. at 456 (even if overcome, presumption "remains instructive" in determining the "extent" of extraterritorial application).

* * *

In sum, the panel's analysis completely fails to refute our showing that § 1962's "focus" is the corruption of enterprises, and that it is limited to domestic enterprises because Congress provided no "clear indication" that it extends to foreign ones too.

III. RICO'S PRIVATE CAUSE OF ACTION DOES NOT REACH FOREIGN INJURIES

The panel compounded its error by failing to apply extraterritoriality principles to § 1964(c), which creates a private right of action in favor of "[a]ny person injured in his business or property by reason of a violation of section 1962." Without any supporting authority, the panel reasoned that any "*conduct*" the government may criminally prosecute under § 1962 also gives rise to a private civil claim under § 1964(c), even for foreign injuries. Pet.App. 57a-58a.

However, § 1964(c) is a separate provision from § 1962 and so, under *Morrison*, its "focus" for extraterritoriality purposes must be analyzed separately. In particular, the "focus" of § 1964(c) is on redressing *injuries* caused by RICO violations, and nothing in the text or context of § 1964(c) clearly rebuts the presumption that it applies only to *domestic* injuries. Indeed, if § 1962 did extend to foreign enterprises and patterns, that would make it all the more important to limit § 1964(c) to domestic injuries. Especially if criminal RICO may be foreign-squared, civil RICO should not be foreign-cubed.

A. The "Focus" of RICO's Private Cause Of Action Is On Injuries Caused By RICO Violations

The "focus" of § 1964(c) is different from that of § 1962. The latter operates to *prohibit the wrongful conduct* of corrupting enterprises in specified ways; the former operates to *redress injuries* caused by that unlawful conduct.

1. This Court's decisions make clear that different provisions in a single statute may have different foci—and thus different geographic sweep. *See, e.g.*, *Morrison*, 561 U.S. at 265, 268 (expressly holding that the territorial scope of § 10(b) of the Exchange Act differs from that of § 30(a) and (b)); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439-41 (1989) (same for 28 U.S.C. § 1605(a)(5) and immediately adjoining § 1605(a)(2)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 588 (1992) (Stevens, J., concurring) (separately analyzing § 7(a)(2) of Endangered Species Act and other ESA sections). Accordingly, any extraterritoriality analysis must proceed provision-by-provision, not statute-by-statute.

That is especially true when analyzing the scope of a private right of action. "[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *see also Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190 (1994) (rejecting contention that "a private right of action exists for all injuries caused by violations of criminal prohibitions"). Instead, whether to create a private cause of action, and of what scope, is a policy decision that Congress must independently address. *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001).

Accordingly, "[t]he scope of the private right of action," if Congress chooses to create one at all, may well be "more limited than the scope of the statutes upon which it is based." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014). That is why the

government in *Morrison* urged this Court, in deciding the extraterritorial issue, to "[d]istinguis[h] between limits on Section 10(b)'s substantive prohibition and additional limits that constrain only the implied private right of action." Br. for United States at 12, 561 U.S. 247 (No. 08-1191).

In short, there is no basis to assume that a criminal prohibition and a corresponding private right of action are coextensive in their "focus," or their geographic scope, any more than to assume that they are coextensive in any other respects.

2. The clear focus of § 1964(c) is on redressing *injuries* caused by RICO violations. Section 1964(c) permits "'any person injured in his business or property by reason of a violation of' RICO's criminal provisions to recover treble damages and attorney's fees." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 183 (1997). Section 1964(c) thus affords relief for certain harms, which are clearly the "objects of its solicitude." *Morrison*, 561 U.S. at 267.

Indeed, redressing private injuries is the *only* thing § 1964(c) seeks to do, for § 1962 makes independently unlawful all of the conduct that can cause a compensable injury. Section 1964(c) thus does not punish violations of § 1962 *simpliciter*, but only violations in connection with certain economic injuries: namely, injuries to business or property that are proximately caused by the violation. *Holmes*, 503 U.S. at 265-68. The cause of action in § 1964(c) is thus focused on the injury, not the underlying offense. *See Morrison*, 561 U.S. at 272.

Moreover, this Court has explained that the purpose of § 1964(c) is to ensure that "innocent

parties who are the victims of organized crime have a right to obtain proper redress." *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 241 (1987). In fact, "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws," *Holmes*, 503 U.S. at 267, which "seeks primarily to enable an injured competitor to gain compensation for that injury," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985). It is thus no surprise that Congress enacted § 1964(c) with a similar purpose in mind—to give "'those who have been wronged by organized crime ... access to a legal remedy.'" *Shearson*, 482 U.S. at 240.

B. There Is No Clear Indication That RICO's Private Cause of Action Extends To Foreign Injuries

Because the focus of § 1964(c) is on redressing injuries, the presumption against extraterritoriality limits that provision to domestic injuries, absent a clear indication that Congress intended also to cover foreign injuries. RICO contains no such clear indication. To the contrary, § 1964(c) is best read as limited to domestic injuries.

1. Nothing in RICO suggests that § 1964 reaches foreign injuries.

To begin, § 1964(c) by its terms does not address its own geographic scope. Rather, it simply provides that "[a]ny person injured in his business or property by reason of a violation of section 1962" may sue for treble damages and fees. Again, such "generic" language—including use of the word "any"—cannot rebut the presumption against extraterritoriality. *See, e.g., Kiobel*, 133 S. Ct. at 1665.

Nor does any other RICO provision bear on this question. Neither RICO's definitional section, 18 U.S.C. § 1961, nor its substantive provisions, *id.* § 1962, addresses the question whether foreign injuries are compensable. And, as explained above, any extraterritorial application of § 1962 would not resolve the geographic scope of § 1964(c). *See, e.g.*, *Morrison*, 561 U.S. at 265.[5]

2. Indeed, construing § 1964(c) as limited to domestic injuries is the best reading of the statute.

First, choice-of-law principles strongly support a domestic-injury limitation to civil RICO. In *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004), this Court held that the foreign-country exception to the Federal Tort Claims Act, which bars injured parties from suing the federal government for tort *claims* "arising in a foreign country," applies only to *injuries* "occurring in a foreign country." *Id.* at 704. Applying that rule, the Court held that a plaintiff could not sue the United States for injuries sustained in Mexico and caused by the negligence of federal officials acting in the United States. *See id.* at 700-03. The Court reasoned that, when the FTCA was

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[5] In fact, Congress often affords private remedies that are geographically narrower than the associated substantive prohibitions. For example, after *Morrison*, Congress amended the Exchange Act to resurrect the "conduct" and "effects" tests for SEC actions. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b)(2)(A), 124 Stat. 1376, 1864 (2010). At the same time, however, it expressly declined to make corresponding amendments for comparable actions brought by injured private parties. *See id.* § 929Y, 124 Stat. at 1871.

enacted, "the dominant principle in choice-of-law analysis for tort cases was *lex loci delecti*: courts generally applied the law of the place where the injury occurred." *Id.* at 705. Moreover, even under the more "flexible" choice-of-law rules that later gained traction, the traditional rule still generally prevailed for tort claims: "'On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort.'" *Id.* at 709 (quoting Restatement (Second) of Conflicts of Laws, § 146, cmt. *e*); *see also id.* at 706 ("For a plaintiff injured in a foreign country," American courts would typically "apply foreign law to determine the tortfeasor's liability."). Accordingly, the Court concluded, the FTCA is best read to incorporate the settled, background place-of-injury rule. *See id.* at 705-11.

Moreover, just last week, this Court applied similar reasoning in construing an exception to the Foreign Sovereign Immunities Act for claims "based upon a commercial activity carried on in the United States." *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 394 (2015). *Sachs* involved a plaintiff injured in Austria by tortious conduct alleged to have occurred in part in the U.S. In dismissing the claims, the Court reasoned that the "essentials" of the claims occurred in Austria, largely because the plaintiff's injury occurred there. *Id.* at 397. The Court quoted with approval a pithy summation of the place-of-injury rule by Justice Holmes: "the 'essentials' of a personal-injury narrative will be found at the 'point of contact'—'the place where the boy got his fingers pinched.'" *Ibid.*

The same reasoning should govern here. When RICO was enacted in 1970, the place-of-injury rule was still "dominant" for tort claims. *Sosa*, 542 U.S. at 705, 709. All impacted sovereigns—including Congress—would have assumed that European law would govern tort or tort-like claims by European governments for injuries they suffered in Europe. Accordingly, RICO should be construed to preserve that understanding, *see id.* at 705-11, and thus to "'protect against unintended clashes between our laws and those of other nations,'" *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248).

Second, this Court has limited the applicability of antitrust law to foreign injuries. In *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Court held that, even though the antitrust laws apply to foreign conduct, private plaintiffs cannot sue "to redress foreign injury" caused by foreign conduct. *Id.* at 169. Moreover, the Court so held even though the government could have sued to enjoin the same conduct. *See id.* at 170-73. The Court explained that this dichotomy existed not only under the specific antitrust amendments directly at issue, *see id.* at 161-62, but also under the original, general terms of federal antitrust law. *See id.* at 169-73. Under both, the result was driven not by text clearly excluding recovery for foreign injuries, but by the principle that "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164.

There is no reason to think that § 1964(c) should be governed by the opposite rule. To the contrary, because "Congress modeled § 1964(c) on the civil-

action provision of the federal antitrust laws," *Holmes*, 503 U.S. at 267, there is good reason to construe those provisions *in pari materia*. *See, e.g.*, *id.* at 267-68; *Shearson*, 482 U.S. at 241. Thus, § 1964(c) should not be construed to permit recovery for foreign injuries, and certainly not for foreign injuries arising out of foreign conduct.[6]

Finally, a domestic-injury rule makes good sense. When substantive criminal law is made extraterritorial, at least the government can mitigate international friction through the exercise of enforcement discretion, which it applies with commendable rigor in the specific context of RICO. *See* Organized Crime & Racketeering Section, Criminal Division, Department of Justice, *Criminal RICO: A Manual For Federal Prosecutors*, Preface (5th ed. 2009) ("All pleadings alleging a violation of RICO ... must be submitted to OCRS for review and approval before being filed with the court."). But private plaintiffs, unlike federal prosecutors, have no such duties or oversight. *See, e.g.*, *Morrison*, 561 U.S. at 284 n.12 (Stevens, J., concurring) (government enforcement "pose[s] a lesser threat to international comity"); Joseph P. Griffin,

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[6] Respondents have previously argued that *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), an antitrust case, supports an extension of § 1964(c) to foreign injuries. But *Pfizer* merely held, based on the antitrust definition of "person," that foreign nations may "sue for treble damages under the antitrust laws to the same extent as any other plaintiff." *Id.* at 320. *Pfizer* did not address whether foreign *injuries* are redressable under antitrust laws. As *Empagran* subsequently made clear, such foreign injuries are not redressable, at least when they arise out of foreign conduct.

Extraterritoriality in U.S. and EU Antitrust Enforcement, 67 ANTITRUST L.J. 159, 194 (1999) ("private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government").

On top of all that, civil RICO has "evolv[ed] into something quite different from the original conception of its enactors," *Sedima*, 473 U.S. at 500, as private plaintiffs now invoke its treble-damages remedy for everything from garden-variety business disputes, *see id.*, to ATS-like human-rights litigation, *see* WLF Cert. Amicus Br. at 13-17. Of course, that is no reason to depart from RICO's plain language, but it *is* reason to adhere to the presumption against extraterritoriality: the "widespread abuse of civil RICO" (*Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1025 (7th Cir. 1992)) should not be allowed to metastasize around the globe.

C. The Panel's Contrary Arguments Are Flawed

After entirely ignoring the injury question in its original opinion, the panel badly botched it on rehearing. The panel did not suggest that § 1964(c) is focused on anything other than redressing injuries, and it likewise did not identify any clear textual indication that the provision applies to foreign injuries. For the reasons explained above, the panel's inability to contest either of those critical points should be dispositive.

Instead, the panel primarily reasoned that the presumption against extraterritoriality governs only

questions regarding what primary "*conduct*" a federal statute encompasses, and thus does not apply at all to questions regarding the *injuries* for which a federal statute provides redress. Pet.App. 57a-58a. The panel additionally reasoned that construing § 1964(c) to afford redress only for domestic injuries would be inconsistent with *Sedima* (Pet.App. 56a) and with the general interpretive principle that RICO should be "liberally construed" (Pet.App. 58a). None of these rationales withstands scrutiny.

1. The panel fundamentally erred in concluding that the presumption against extraterritoriality cannot apply to questions of injury as opposed to conduct. Abundant precedent rebuts that contention.

In *Chisholm*, this Court applied the presumption to hold that the Federal Employers' Liability Act, which provides a statutory cause of action to railroad workers injured in the course of their employment, does not extend to "an injury in a foreign country." 268 U.S. at 30. *Chisholm* involved an American citizen employed by an American carrier on a route between New York and Montreal. The Court held that, because the employee had "suffered fatal injuries at a point thirty miles north of the international line," FELA did not apply. *Id.* In so doing, the Court specifically invoked the principle that "'[l]egislation is presumptively territorial.'" *Id.* at 31.

Similarly, in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), this Court applied *Chisholm* to hold that the Jones Act, which provides a statutory cause of action for seamen injured in the course of their employment, also does not extend to foreign injuries.

Accordingly, it ordered the dismissal of a Jones Act claim brought by a seaman injured "in the course of employment, while in Havana harbor." *Id.* at 573. The Jones Act by its terms covers "any seaman," but this Court construed that language not to extend "to foreign events or transactions." *Id.* at 579. Finally, *Lauritzen* cannot possibly have rested on a place-of-the-negligence rule, as opposed to a place-of-the-injury rule, because the Jones Act affords at least one remedy (maintenance and cure) without regard to any negligence. *See id.* at 577.

Moreover, the Second Circuit's reasoning is inconsistent with this Court's cases involving the presumption against extraterritoriality, which have never distinguished *substantive* provisions from *remedial* ones, but have applied the presumption uniformly to *all* "legislation of Congress," *Morrison*, 561 U.S. at 255—including procedural provisions akin to § 1964(c). For example, *Kiobel* applied the presumption to the Alien Tort Statute, a law that "does not directly regulate conduct or afford relief," 133 S. Ct. at 1664, but is merely jurisdictional in nature. And *Sale* applied it to a statutory provision governing the *procedures* the Attorney General must follow with respect to deportations. 509 U.S. at 170, 173-74. If the presumption governs even such purely procedural provisions, then surely it governs § 1964(c), which creates a new federal cause of action. *See also Empagran*, 542 U.S. at 164, 173-74 (limiting private right of action, even though conduct was plainly proscribed and subject to prosecution).

Indeed, the Second Circuit recognized as much in a different decision. In *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014), the

plaintiff argued "that *Morrison* governs substantive (conduct-regulating) provisions rather than procedural provisions such as" the private right of action at issue. *Id.* at 272. The court flatly rejected that contention. The court explained that *Morrison* "draws no such distinction"; that it "holds that the presumption applies generally to 'statutes'"; and that it "discouraged courts from making fussy distinctions in deciding whether or not the presumption applies." *Id.* Likewise, the court explained, the proposed distinction "between substantive provisions and those that only create a cause of action" is also "foreclosed by *Kiobel*." *Id.*

Finally, the panel's reasoning is inconsistent not only with this considerable body of precedent explicitly applying the presumption to questions of injury, cause of action, and other non-substantive matters, but also with *Sosa* and *Empagran*. While *Sosa* had no occasion to invoke the presumption explicitly, the choice-of-law principles that it applied also animate the presumption. *See, e.g.*, *Lauritzen*, 345 U.S. at 583-89; *Chisholm*, 268 U.S. at 31-32. Similarly, while *Empagran* described itself as a case turning on international "comity," it too is now widely understood as resting on the presumption. *See, e.g.*, *Microsoft*, 550 U.S. at 456; *Morrison*, 561 U.S. at 280 (Stevens, J., concurring in the judgment); *Pasquantino*, 544 U.S. at 378-79 (Ginsburg, J., dissenting).

2. The panel's alternative rationales are even weaker. As for *Sedima* (Pet.App. 56a), that case merely held that § 1964(c) does not require a "racketeering" injury above and beyond harm to business or property proximately caused by a

substantive RICO violation. 473 U.S. at 494-98. The Court was not presented with, and did not address, any question about extraterritoriality.

Nor is the principle that RICO should be "liberally construed" (Pet.App. 58a) a license to disregard the presumption against extraterritoriality. If use of sweeping but general terms like "any" or "every" does not overcome the presumption, *see Kiobel*, 133 S. Ct. at 1665, then neither does use of a broad but vague canon regarding liberal construction.

* * *

In sum, contrary to the panel, the presumption against extraterritorially fully applies to statutes creating private rights of action, which are distinct from the underlying substantive provisions. Here, § 1964(c)'s "focus" is on injury, and it is limited to domestic injuries because Congress provided no "clear indication" that it extends to foreign ones too.

IV. RESPONDENTS' RICO CLAIMS SHOULD BE DISMISSED

Under either of the two extraterritoriality rules explained above, the RICO claims in this case must be dismissed. After nearly 15 years of litigation, six different complaints, and three dismissals, the time has come to put these claims to an end.

1. The operative complaint fails to allege a domestic enterprise. It alleges a single enterprise: an "association-in-fact" labeled the "RJR Money-Laundering Enterprise" and defined as petitioners, drug traffickers, and "associated distributors, shippers, currency dealers, wholesalers, money brokers, and other participants" working together to

launder the proceeds of illegal drug sales in Europe. Pet.App. 237a-238a. Applying the conventional "nerve-center" test used to identify the location of a corporation or association, *Hertz*, 559 U.S. at 92-93, the district court held that this alleged enterprise was foreign. Pet.App. 51a-52a. The Second Circuit did not question that holding, Pet.App. 14a, and respondents did not dispute it in opposing certiorari—thereby waiving the point. *See Baldwin v. Reese*, 541 U.S. 27, 34 (2004); *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999).

Furthermore, the district court's holding was clearly correct. The nerve-center test looks to the headquarters of the entity—the place from where it is directed and controlled. *Hertz*, 559 U.S. at 93. Here, petitioners are alleged to be, at worst, enablers of a scheme masterminded and controlled from abroad, by foreign organized criminals. Petitioners are, as the district court correctly held, "nothing more than sellers of fungible goods in a complex series of transactions directed by South American and Russian gangs." Pet.App. 52a. Indeed, the fungibility of Petitioners is confirmed by Respondents' filing almost identical RICO actions against various *other* tobacco manufacturers. *Supra* at 7 n.2. At its core, the alleged global association is plainly a "foreign" enterprise.

In its amended opinion, the panel briefly suggested an entirely different enterprise theory: that the complaint states a claim under § 1962(a) for the alleged investment of racketeering proceeds in the Brown & Williamson Tobacco Company ("B&W"), a domestic enterprise. Pet.App. 13a-14a n.5. However, the complaint never alleges that B&W was

the RICO enterprise. Rather, Count 1, which sets forth the claim under § 1962(a), rests entirely on the foreign-based "RJR Money-Laundering Enterprise." Pet.App. 237a-238a. It alleges that this "RJR Money-Laundering Enterprise" exhibits sufficient common purpose, ascertainable structure, and continuity to satisfy RICO's statutory definition of an "enterprise." Pet.App. 238a. After making pattern allegations (Pet.App. 238a-250a), the complaint then alleges the prohibited investment. It says that the defendants used racketeering proceeds "to acquire an interest in, establish, and operate the RJR Money-Laundering Enterprise." Pet.App. 251a (¶ 162). Next, in the very paragraph cited by the panel, the complaint repeats the allegation that petitioners used racketeering proceeds "to acquire an interest in, establish, and operate the RJR Money-Laundering Enterprise." *Id.* (¶ 163). B&W is not so much as mentioned in Count 1 of the complaint.

Moreover, the difference between the claim actually asserted (based on the alleged acquisition of the "RJR Money-Laundering Enterprise") and the claim imagined by the panel (based on the acquisition of B&W) is no mere pleading quibble. Under the latter theory, respondents would have to prove not that they were injured by the alleged investment in a sprawling "Money-Laundering Enterprise" with tentacles around the globe, but that they were injured by Reynolds' domestic acquisition *of B&W*. As the text of § 1962(a) makes clear, and as the panel acknowledged, damages for a § 1962(a) claim must flow not from the predicate acts, but from the investment in the enterprise. Pet.App.13a n.5; *Ouaknine v. MacFarlane*, 897 F.2d 75, 83 (2d Cir.

1990). The complaint does not, and could not, allege damages from Reynolds' domestic investment in B&W. Indeed, the dozens of paragraphs alleging respondents' injuries *never mention* B&W. Pet.App. 210a-227a. Thus, the B&W-as-enterprise claim would have been dismissed if respondents had alleged it, which they did not.

2. The complaint also fails to adequately allege any domestic injuries. The vast bulk of alleged injuries are sovereign harms supposedly suffered by respondents within their own borders, such as harm to their economies and financial institutions, instability of the Euro, increased law-enforcement costs, and lost tax revenues. Pet.App. 215a-228a. These injuries are impermissibly foreign, and recovery for them has already been held barred by the revenue and penal-law rules. *See European Cmty.*, 355 F.3d at 131-38 (Sotomayor, J.).

To avoid the latter problem, respondents now allege proprietary injuries suffered as competing cigarette sellers. Pet.App. 210a-215a. In describing their commercial activities, respondents say that "[m]any" (but not all) of them have manufactured or sold cigarettes, including as lawful monopolists, "within their borders." Pet.App. 139a. Any lost sales or profits they suffered "within their borders" in Europe also clearly constitute foreign injuries.

To be sure, respondents make a fleeting allegation of competitive injury "in the European Community and in other markets in which they compete including, but not limited to, the United States." Pet.App. 210a. However, the complaint does not even identify which of the European sovereign nations ever engaged in selling cigarettes,

much less selling cigarettes *in the United States*. Nor does it allege *when* any of them was so engaged. In addition, respondents do not explain how alleged money laundering in Colombia, Panama, and Venezuela, involving drug proceeds from Europe and cigarettes exported to Europe, could have proximately harmed, for example, the Grand Duchy of Luxembourg in any competition *in the U.S.* against Reynolds and other U.S. cigarette manufacturers. For all these reasons, the allegation that unspecified respondents, at unspecified times, suffered actionable competitive impacts in vaguely-specified markets "including" the U.S. is both too conclusory, and too implausible, to state a claim. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

3. Alternatively, this case should be remanded so that the lower courts may assess which portions of the RICO claims, if any, remain viable. In reversing the district court's dismissal, the panel ruled that a civil RICO claim may rest on a foreign racketeering pattern, a foreign enterprise, and a foreign injury. This case involves all three. Thus, if any of the holdings below is wrong, the judgment below must at least be set aside.

CONCLUSION

The judgment of the court of appeals should be reversed and the RICO claims dismissed. Alternatively, the judgment should be vacated and the case remanded for further proceedings consistent with the Court's opinion.

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APPENDIX

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides as follows:

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization

unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money

transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled

substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten

years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited Activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his

immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal Penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over; any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) **(1)** Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed,

removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, that an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the

earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall

expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for

violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring

property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title,

or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

> **(A)** the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts

which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section; the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty; the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

§ 1964. Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in

which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and Process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without

approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of Actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil Investigative Demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary

materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in

aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)

(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and

copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before

any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such

investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated. Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which

such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of

such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the material so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

No. 15-138

IN THE
Supreme Court of the United States

RJR NABISCO, INC., ET AL.,
Petitioners,

v.

THE EUROPEAN COMMUNITY,
ACTING ON ITS OWN BEHALF AND ON BEHALF OF THE
MEMBER STATES IT HAS POWER TO REPRESENT, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a claim under the Racketeer Influenced and Corrupt Organizations Act may be sustained by pleading both domestic and extraterritorial conduct, where Congress has expressly provided for the extraterritorial application of the statute and where well-settled canons of statutory construction provide that foreign plaintiffs may recover for injuries sustained abroad.

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INTRODUCTION

After an extensive investigation by European governmental officials revealing serious misconduct by petitioners, respondents filed this suit under the common law and the Racketeer Influenced and Corrupt Organizations Act ("RICO") to redress petitioners' widespread racketeering activities. Respondents' complaint alleges petitioners directed money-laundering and other criminal activities from their U.S. headquarters, from which they dispatched U.S. citizen-employees to travel abroad to deal directly with criminal elements. The case concerns claims against U.S. defendants that committed RICO predicate acts through domestic and foreign conduct and caused domestic and foreign injuries to respondents. Because petitioners' illegal scheme had global reach, the complaint also alleges petitioners' unlawful conduct outside the United States as part of a global scheme directed from the United States.

Congress enacted RICO with express extraterritorial scope, limited in a manner consistent with international law. It incorporated predicate statutes that specifically apply to extraterritorial conduct, including conduct that occurs exclusively outside the United States. Congress also adopted language from the Clayton Act with a well-established meaning of extraterritorial application. Traditional tools of statutory interpretation thus demonstrate RICO applies to certain extraterritorial conduct and its civil cause of action provides recovery for injuries suffered abroad.

Petitioners advance two main attacks on that straightforward understanding of Congress's intent, but neither has merit. First, petitioners contend RICO's focus is the "enterprise" rather than the conduct the statute proscribes, and therefore that enter-

prise must be domestic, rather than foreign. Leaving aside that respondents' complaint alleges domestic enterprises, the statute cannot bear petitioners' restrictive construction. RICO's text, structure, and history demonstrate its focus on the *corruption* of enterprises through the commission of predicate acts, whether they are domestic, foreign, or transnational entities. Congress made clear that RICO's prohibition includes such crimes as international money laundering and financial support of terrorist groups. Limiting RICO to domestic enterprises would thus be illogical and self-defeating to the broad purposes this Court has recognized Congress enacted RICO to address.

Petitioners' second attack on RICO's extraterritorial reach – that RICO redresses only domestic *injuries* – also fails. That contention conflicts with centuries-old authority, which confirms that foreigners can resort to U.S. courts to redress injuries caused by Americans. Adhering to that longstanding principle, Congress incorporated into RICO the Clayton Act's remedial language, which had been construed to permit foreigners to sue U.S. entities for injuries sustained abroad. The Solicitor General's separate theory to limit damages to domestic injuries based on comity interests represents a novel and atextual policy preference that cannot override Congress's clear enactment and is in tension with prior Executive Branch representations to this Court. In light of its longstanding jurisprudence that has served the Nation well in the international community, the Court should reject petitioners' novel limitation on RICO's remedial provision.

STATEMENT OF THE CASE

A. Statutory Background

1. In 1970, Congress enacted RICO, Pub. L. No. 91-452, tit. IX, 84 Stat. 922 (codified at 18 U.S.C. § 1961 *et seq.*), to "provid[e] enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923. Congress recognized "organized crime derives a major portion of its power through money obtained from . . . illegal endeavors" and "this money and power are increasingly used to infiltrate and corrupt legitimate businesses and labor unions." *Id.* at 922-23. "[O]rganized crime activities in the United States . . . seriously burden interstate and foreign commerce." *Id.* at 923. "[T]he RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States*, 464 U.S. 16, 26 (1983). Congress intended RICO "to be 'liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 556 U.S. 938, 944 (2009) (quoting RICO § 904(a), 84 Stat. 947).

Section 1962 contains RICO's substantive prohibitions. Section 1962(a) makes it "unlawful for any person" "to use or invest" "any income derived . . . from a pattern of racketeering activity" to "acqui[re]" an "interest" in an "enterprise." 18 U.S.C. § 1962(a). Section 1962(b) prohibits "any person through a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise." *Id.* § 1962(b). Section 1962(c) proscribes "any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). Section

1962(d) makes it "unlawful for any person to conspire to violate any of the provisions of . . . this section." *Id.* § 1962(d).

Congress defined "racketeering activity" as "any act which is indictable under" any of more than 100 specifically enumerated federal criminal statutes or "any act or threat involving" a variety of crimes "chargeable under State law." *Id.* § 1961(1). It further defined "pattern of racketeering activity" to "require[] at least two acts of racketeering activity." *Id.* § 1961(5). An "enterprise" is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4).

RICO provides civil remedies and imposes criminal sanctions for violations of its substantive prohibitions. Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of [S]ection 1962" may bring a civil action to recover treble damages and attorneys' fees. *Id.* § 1964(c). The statute also provides for equitable relief "to prevent and restrain violations of [S]ection 1962." *Id.* § 1964(a).

2. Congress has included numerous "predicate" crimes in defining "racketeering activity" that apply to extraterritorial conduct. *See* U.S. Br. App. B (listing dozens of "Selected RICO Predicates With Extraterritorial Application"). For example, RICO's original set of predicate crimes included "any offense involving . . . buying, selling, or otherwise dealing in narcotic or other dangerous drugs." 18 U.S.C. § 1961(1)(D) (1970). Congress also criminalized the conduct of "any person to manufacture or distribute a controlled substance . . . intending . . . or knowing

that such substance will be unlawfully imported into the United States." Controlled Substances Import and Export Act, Pub. L. No. 91-513, tit. III, § 1009, 84 Stat. 1236, 1285, 1289 (1970). Congress expressly provided that this RICO predicate "reach[es] acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." *Id.*

Congress has since amended RICO repeatedly to expand its definition of "racketeering activity" to include new predicate crimes with express extraterritorial effect. In 1986, it enacted a new money-laundering statute and included it within the definition of "racketeering activity." Money Laundering Control Act of 1986, Pub. L. No. 99-570, tit. I, subtit. H, § 1365(b), 100 Stat. 3207, 3207-18, 3207-35. Congress expressly provided for "extraterritorial jurisdiction over the conduct prohibited" by the new RICO predicate if the money laundering involved transactions above $10,000 and was committed by a U.S. citizen or, in the case of a non-U.S. citizen, the conduct occurs in part in the United States. *Id.* § 1352(a), 100 Stat. 3207-20 (codified at 18 U.S.C. § 1956(f)).

After al-Qaeda's attacks on September 11, 2001, Congress again amended RICO's definition of "racketeering activity" to include dozens of terrorism-related predicate crimes. *See* USA PATRIOT Act, Pub. L. No. 107-56, § 813, 115 Stat. 272, 382. Congress's amendments to RICO targeted "[a]cts of terrorism transcending national boundaries," 18 U.S.C. § 2332b, such that specific terrorism-related predicates apply extraterritorially by their plain terms. *See, e.g.*, *id.* § 37 (criminalizing certain violence at international airports in the United States or abroad); *id.* § 1203 (criminalizing taking certain

hostages in the United States or abroad). Some apply only to conduct committed abroad. *See, e.g., id.* § 2332 (criminalizing "kill[ing] a national of the United States, while such national is outside the United States"); *id.* § 2340A(a) (making it unlawful to "commit[] or attempt[] to commit torture" while "outside the United States").

B. Respondents' Investigation Of Cigarette Trafficking And Money Laundering

Respondents are the European Community and 26 of its Members States. App. 136a-140a (¶¶ 5-7). The European Community (which became the European Union on December 1, 2009, under the Lisbon Treaty) is a governmental body created by its Member States, which constitute the majority of the nations of Europe. *See* Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, O.J. C 326 (Oct. 26, 2012), http://www.ecb.europa.eu/ecb/legal/pdf/c_32620121026en.pdf.

In the 1990s, respondents initiated an investigation into cigarette trafficking into the European Community and through Europe to the Middle East (including Iraq). That investigation, led by the European Anti-Fraud Office (known by its French acronym "OLAF") and its predecessor task force, revealed widespread transnational trafficking and money laundering by petitioners.

OLAF conducted a comprehensive investigation into petitioners' conduct, including cigarette sales and money laundering through criminal channels into and through the European Union. OLAF cooperated with law enforcement authorities in the United States and other nations to combat the misconduct.

Petitioners' affiliates and employees were convicted and substantial fines were imposed in the United States and Canada as a result of petitioners' misconduct in Canada.[1]

Respondents subsequently entered into agreements with petitioners' competitors in the tobacco industry. These agreements committed them to combat illegal trafficking and money laundering and to pay substantial monetary consideration. Specifically, on July 9, 2004, respondents entered into an anti-contraband and anti-counterfeit agreement with Philip Morris International that included agreed-upon protocols and payments in excess of $1 billion over 12 years.[2] On December 14, 2007, respondents

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[1] *See* Agreed Statement of Facts Containing Admissions Made Pursuant to s.655 of the Criminal Code, *Her Majesty the Queen in Right of Canada v. Northern Brands Int'l, Inc.* (Ontario Ct. of Justice filed Apr. 13, 2010) (petitioners' affiliate pleaded guilty to a criminal conspiracy to defraud Canada and was fined C$75,000,000; R.J. Reynolds Tobacco Company agreed to pay C$325,000,000 to Canada); Reynolds American Inc., SEC Form 8-K, Exhs. 10.2 & 99.1 (Apr. 13, 2010); U.S. Dep't of Justice, Press Release, "R.J. Reynolds Affiliate Pleads Guilty, Pays $15 Million in Criminal Fines and Forfeitures as Part of Cigarette Smuggling Operation" (Dec. 22, 1998) ("An affiliate of R.J. Reynolds Tobacco International Inc. – Northern Brands International Inc. – pleaded guilty today and agreed to pay a total of $15 million in criminal fines and forfeitures for aiding and abetting customers who evaded more than $2.5 million in U.S. excise taxes by fraudulently transporting within the United States cigarettes that were intended to be exported"), *available at* http://www.justice.gov/archive/opa/pr/1998/December/605usa.htm.

[2] *See* European Commission, Press Release No. IP/04/882, "European Commission and Philip Morris International sign 12-year Agreement to combat contraband and counterfeit ciga-

reached an anti-contraband and anti-counterfeit agreement with Japan Tobacco International that included agreed-upon protocols and payments of $400 million over 15 years.[3] On July 15, 2010, respondents entered into a Cooperation Agreement with British American Tobacco that included agreed-upon protocols and payments of $200 million over 20 years.[4] Finally, on September 27, 2010, respondents reached a Cooperation Agreement with Imperial Tobacco Limited that included agreed-upon protocols and payments of $300 million over 20 years.[5]

Alone among the major international tobacco companies, RJR Nabisco, Inc., a major American tobacco manufacturer, and several of its American corporate affiliates (collectively, "RJR"), continue to engage in unlawful business practices and refuse to adopt reforms to eliminate illegal cigarette trafficking and money laundering. After consultation with American

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rettes" (July 9, 2004), *available at* http://europa.eu/rapid/press-release_IP-04-882_en.htm?locale=en.

[3] *See* European Commission, Press Release No. IP/07/1927, "European Commission and JT International (Japan Tobacco) sign 15-year Agreement to combat contraband and counterfeit cigarettes" (Dec. 14, 2007), *available at* http://europa.eu/rapid/press-release_IP-07-1927_en.htm?locale=en.

[4] *See* European Commission, Press Release No. IP/10/951, "European Commission and British American Tobacco sign agreement to combat illicit trade in tobacco" (July 15, 2010), *available at* http://europa.eu/rapid/press-release_IP-10-951_en.htm?locale=en.

[5] *See* European Commission Press Release No. IP/10/1179, "European Commission and Imperial Tobacco sign agreement to combat illicit trade in tobacco" (Sept. 27, 2010), *available at* http://europa.eu/rapid/press-release_IP-10-1179_en.htm.

authorities,[6] respondents brought this suit in the United States to end petitioners' continued unlawful conduct that harms respondents.

C. Petitioners' Money-Laundering Scheme

The operative complaint alleges grave misconduct by petitioners as revealed by the investigation described above. For more than two decades, RJR has orchestrated a criminal scheme "to sell cigarettes as a means of laundering criminal proceeds – that is, to sell cigarettes to and through criminal organizations and to accept criminal proceeds in payment for cigarettes by secret and surreptitious means." App. 134a-135a (¶ 3); *see also* App. 193a (¶ 112) (RJR "has been responsible for large cigarette sales into illegal channels in the European Community and has received criminal proceeds in payment for their cigarettes"). Petitioners executed their unlawful scheme by "knowingly sell[ing] their products to organized crime, arrang[ing] for secret payments from organized crime, and launder[ing] such proceeds in the United States or offshore venues known for bank secrecy." App. 134a (¶ 2). In particular, petitioners laundered "enormous amounts of Colombian cocaine money and Russian heroin money derived from narcotics sales in the United States and the European Community." App. 166a (¶ 53). Petitioners also sold cigarettes "into Iraq . . . for the benefit of various terrorist groups." App. 178a-179a (¶ 80).

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[6] *See* Declaration of Hon. Franz-H. Brüner, Director-General of OLAF, European Anti-Fraud Office, ¶ 2, *European Community v. RJR Nabisco, Inc.*, No. 01-Civ-5188, Document 70-6 (E.D.N.Y. filed Feb. 13, 2002) ("I personally informed the United States Department of Justice in July 2000 of the European Commission's intention to file [litigation against RJR]").

High-level managers and employees of RJR directed and controlled that scheme from its headquarters in the United States. For example, RJR employees from the United States regularly traveled to Colombia, met with known money launderers and narcotics traffickers, exchanged large quantities of cigarettes for cash, and then transferred the cash into bank accounts in the United States. App. 174a-177a (¶¶ 70-74). The complaint details a "monthly routine" by RJR employees to "travel[] with authorized RJR distributors [and] ... enter Colombia illegally." App. 174a (¶ 71). These RJR employees "would meet face to face with money launderers and narcotics traffickers" and "would receive payments for cigarettes in the form of bulk cash." *Id.* "The employees ... would then travel back to Venezuela, bribing border guards at the Venezuelan border to ensure that they could move the cash illegally across the border into Venezuela. Once the employees ... reached a major Venezuelan city such as Maracaibo they would ... wire transfer the funds to [RJR's] bank ... in the United States, thereby completing the money-laundering cycle." App. 175a (¶ 71).

The complaint further alleges in detail a variety of other mechanisms petitioners have used to execute their money-laundering scheme. These other mechanisms include selling cigarettes to known criminal organizations in Panama for sale in Europe, App. 170a-171a (¶¶ 65-66); trafficking cigarettes specifically designed for sale in the Middle East through Turkey into Iraq in violation of international sanctions and then laundering the proceeds, App. 178a-179a (¶ 80); and purchasing bonds overseas using the proceeds of illicit cigarette sales to criminal organiza-

tions and selling those bonds in the United States to conceal the source of the revenue, App. 175a-177a (¶¶ 73-74). At every step, RJR structured its transactions to shield them from detection by United States and European authorities. App. 167a, 172a-174a (¶¶ 56, 69).

In 2004, RJR used a substantial portion of the proceeds of this illegal money-laundering scheme to acquire the U.S. operations of Brown & Williamson ("B&W"), the U.S. subsidiary of British American Tobacco. App. 188a-190a, 251a-253a (¶¶ 100-103, 162-163). RJR previously had sold its international operations to Japan Tobacco International. App. 151a (¶ 29). RJR targeted B&W because it knew the latter's brands were popular in Europe and that the acquisition would expand its capacity to launder criminal proceeds through the sale of cigarettes destined for European markets. App. 189a (¶ 102). RJR integrated its newly acquired B&W operations into its unlawful schemes and used B&W to expand their scope. App. 189a-190a (¶¶ 102-103).

D. Proceedings Below

1. Respondents brought suit against petitioners in the Eastern District of New York for claims under the common law and RICO, seeking damages and equitable relief. App. 135a-136a (¶ 4).

The complaint alleges petitioners engaged in a pattern of racketeering activity consisting of money laundering, 18 U.S.C. §§ 1956-1957; providing material support to foreign terrorist organizations, *id.* § 2339B; mail fraud, *id.* § 1341; wire fraud, *id.* § 1343; and violations of the Travel Act, *id.* § 1952. The bulk of the conduct constituting those unlawful acts took place in the United States. That domestic

conduct included directing and orchestrating the scheme from petitioners' corporate headquarters in Winston Salem and New York; the use of the mail and wires in the United States to coordinate the execution of the scheme; receipt and laundering of the proceeds of unlawful conduct in its accounts in New York financial institutions; and interstate and international travel from New York and Miami in furtherance of its criminal activities. App. 134a, 174a-188a (¶¶ 2, 70-99).

The complaint alleges violations of Sections 1962(a)-(d) based on that predicate racketeering activity. Petitioners violated Section 1962(a) by investing the proceeds of this pattern of racketeering in B&W. App. 188a-190a (¶¶ 100-103). Petitioners violated Sections 1962(b) and (c) by acquiring and maintaining control of, and conducting the affairs of, its money-laundering enterprise through that pattern of racketeering activity. App. 253a-256a (¶¶ 166-173). Petitioners are liable under Section 1962(d) for conspiring together and with others to violate RICO's substantive prohibitions. App. 257a-260a (¶¶ 174-180). The complaint alleges that respondents were injured by reason of petitioners' RICO violations in numerous ways. App. 210a-229a (¶¶ 146-148). The complaint seeks compensatory damages under Section 1964(c) and injunctive relief under Section 1964(a) requiring petitioners to cease their unlawful conduct. App. 229a-234a (¶¶ 149-154).

2. Petitioners moved to dismiss respondents' RICO claims. App. 40a. After this Court decided *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court ordered supplemental briefing to address the decision's effect on those

claims. On March 8, 2011, the district court granted petitioners' motion to dismiss on the ground that RICO does not apply to activity outside the United States and cannot apply to a foreign enterprise. App. 37a-54a.[7]

3. The court of appeals reversed. App. 1a-36a. The court "[r]ecogniz[ed] that there is a presumption against extraterritorial application of a U.S. statute unless Congress has clearly indicated that the statute applies extraterritorially," and it "conclude[d] that, with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially." App. 3a (citing *Morrison*). The court further recognized that RICO "incorporates by reference various federal criminal statutes" that "unambiguously and necessarily involve extraterritorial conduct." App. 9a-10a. The court explained that, "[b]y incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." App. 11a.

The court of appeals "reject[ed] . . . the district court's conclusion . . . that RICO has an exclusive focus on the location of the enterprise, which alone

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[7] The district court also dismissed respondents' state common-law claims on the ground that the court lacked diversity jurisdiction, reasoning that the European Community is not an organ of a foreign state under 28 U.S.C. §§ 1332 and 1603. App. 2a. The court of appeals reversed that holding. App. 3a. Petitioners do not challenge that aspect of the Second Circuit's judgment in this Court.

determines whether a particular application is impermissibly extraterritorial." App. 16a n.6. The court therefore refused to impose a "requirement that the defendant be . . . associated with a domestic enterprise in order to sustain RICO liability." App. 14a.

Applying those holdings, the court of appeals concluded that respondents' claims based on money laundering and material support of terrorism "meet the statutory requirements for extraterritorial application of RICO." App. 16a-18a. The court further concluded that the complaint alleged "domestic conduct" and a "domestic cause of action" with respect to petitioners' mail fraud, wire fraud, and violations of the Travel Act. App. 18a-21a, 23a. The court therefore held that the complaint states a claim under RICO for the alleged predicate crimes. App. 3a.

4. The court of appeals denied petitioners' requests for panel rehearing and rehearing en banc. The panel rejected petitioners' contention that RICO "requires private plaintiffs to allege a domestic injury." App. 55a. It explained that "[t]he presumption against extraterritoriality . . . is primarily concerned with the question of what *conduct* falls within a statute's purview." App. 58a. Relying on this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), the panel "look[ed] to the relevant predicate statute to determine whether the injury caused by a violation thereof must be domestic." App. 57a. It concluded that, "[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad," there is "no reason to import a domestic injury requirement

simply because the victim sought redress through the RICO statute." App. 57a-58a.

The Second Circuit also denied petitioners' request for rehearing en banc, with Judge Hall concurring separately. App. 59a-60a. Judge Lynch dissented from that order on the ground that the case warranted en banc review but agreed with the panel's holding on RICO's extraterritorial scope. App. 97a-98a. Judges Jacobs, Cabranes, Livingston, and Raggi dissented from the denial expressing their disapproval of the panel's holding. App. 60a.

SUMMARY OF ARGUMENT

I. The complaint alleges domestic RICO violations. Petitioners are all American corporations domiciled in the United States. The complaint alleges petitioners engaged in racketeering activity that indisputably took place in the United States and involved indisputably domestic enterprises. The complaint therefore states claims for domestic violations of RICO based on domestic conduct.

II. The remaining allegations in the complaint fall within RICO's permissible extraterritorial scope.

A. Congress spoke with perfect clarity that a violation of Section 1962 may be based on conduct abroad that violates a predicate statute that itself has extraterritorial application. Numerous RICO predicates have express extraterritorial effect, including some that have exclusively extraterritorial application. Congress's inclusion of those predicates in RICO's definition of "racketeering activity" would have been meaningless if the pattern could not include violations of those predicates. To the extent the complaint alleges RICO violations based on con-

duct abroad, that conduct violates predicate statutes with express extraterritorial application and therefore fall within RICO's territorial scope.

B. RICO focuses on the conduct it makes unlawful: investing in, acquiring or maintaining control of, or conducting the affairs of an enterprise through a pattern of racketeering activity. This Court repeatedly has explained that "the heart of any RICO complaint is the allegation of a pattern of racketeering." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (emphasis omitted); *Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("object of civil RICO" is to eliminate "racketeering activity"). RICO's text, structure, and history confirm that Congress focused on the evil it sought to combat: the "infiltration and control" of organizations using patterns of racketeering activity.

Petitioners' contrary arguments lack merit. Indeed, they concede that "it is the *corrupting influence on the enterprise* that is ultimately the touchstone for RICO liability; that is the common focus of [Section] 1962." Pet. Br. 30. Their attempts to avoid the implications of that concession fail. RICO's text, structure, and history provide no support for their claim that Congress's primary concern was the enterprise rather than the conduct Section 1962 proscribes. Because Section 1962 focuses on the conduct it makes unlawful rather than the enterprise, it applies to a defendant's conduct within RICO's territorial scope, regardless where the enterprise may be located.

C. Section 1964(c) provides a cause of action to recover for injuries to a plaintiff's "business or property" "by reason of a violation of [S]ection 1962," regardless of where that injury is suffered. American

courts have always been open to plaintiffs who suffer injuries abroad caused by conduct that violated American law. Congress modeled Section 1964(c) on Section 4 of the Clayton Act, which this Court held and Congress understood encompasses foreign injuries. Against that background, Congress enacted Section 1964(c) to apply to injuries abroad as well. This Court accordingly has applied Section 1964(c) to foreign injuries. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

The Court should reject both the Solicitor General's and petitioners' contrary arguments. The Solicitor General's argument invoking comity considerations contravenes Congress's clear intent that Section 1964(c) applies to injuries abroad, and in any event invents a new comity canon that has no basis in this Court's cases or in international law. The Solicitor General's argument is particularly misplaced in this case, which was brought by 26 sovereign foreign states that are among the United States' closest and oldest allies, and the European Community that was founded by them. Any comity concerns implicated by other cases brought in different circumstances are adequately addressed by other legal doctrines that may bar such suits. Finally, petitioners mistakenly argue that RICO is limited to domestic injuries, but neither state choice-of-law principles nor this Court's cases compel the conclusion that Section 1964(c) is limited to domestic injuries.

ARGUMENT

I. THE COMPLAINT ALLEGES DOMESTIC RICO VIOLATIONS

Before addressing the issue of RICO's extraterritorial reach, respondents note this case requires only a domestic application of RICO. The complaint alleges indisputably domestic RICO violations, and so regardless of its resolution of the Question Presented the Court should reject petitioners' invitation (at 56-60) to order dismissal. Where the facts underlying every aspect of a claim are domestic, the application of the statute is domestic, and the presumption against extraterritoriality is not implicated. *See Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 267 n.9 (2010). That is true here: the complaint alleges that American defendants engaged in patterns of racketeering activity on American soil involving American enterprises that give rise to RICO violations in the United States. No court has ruled on the sufficiency of those allegations. Accordingly, even if the Court rules that RICO lacks extraterritorial effect with respect to any aspect of the factual elements of a claim, respondents' remaining claims should proceed in district court.

A. The Complaint Alleges Domestic Racketeering Conduct

Petitioners (defendants below) are exclusively American corporations, with headquarters and operations based in the United States, where their pattern of racketeering activity was directed and managed. App. 140a-150a, 203a-204a (¶¶ 8-26, 135). Indeed, petitioners' contacts are so extensive that they clearly satisfy the standard for general personal jurisdiction in a domestic forum. *See Daimler AG v.*

Bauman, 134 S. Ct. 746, 760 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'") (citation omitted; alterations in original).

Petitioners engaged in a pattern of racketeering activity in the United States. The complaint alleges petitioners:

- Received funds in the United States that they knew to be the proceeds of illegal narcotics trafficking and the proceeds of terrorist activity, in violation of 18 U.S.C. § 1956(a)(2). App. 238a-248a (¶ 159(a)-(i)).
- Traveled using the facilities of interstate commerce in the United States in furtherance of unlawful activity, in violation of 18 U.S.C. § 1952. App. 249a-250a (¶ 159(l)).
- Provided material support to a foreign terrorist organization "in the United States and elsewhere" in violation of 18 U.S.C. § 2339B. App. 248a (¶ 159(j)).
- Used the U.S. mails and wires in the United States in furtherance of a "scheme or artifice" in violation of 18 U.S.C. §§ 1341 and 1343. App. 248a-249a (¶ 159(k)).

RICO enumerates all of these statutes as predicates. *See* 18 U.S.C. § 1961. These allegations thus constitute a wholly domestic pattern of racketeering activity.

B. The Enterprises Associated With Petitioners' Patterns Of Racketeering Activity Are Domestic

1. Petitioners have violated Sections 1962(a) and (b) involving a domestic enterprise. *First*, certain petitioners violated those provisions by acquiring B&W, an American corporation and therefore indisputably a domestic enterprise. By that acquisition, they invested in B&W using the income and proceeds of their pattern of racketeering activity, thereby violating Section 1962(a). They also acquired and maintained control of B&W through their pattern of racketeering activity, thereby violating Section 1962(b). App. 188a-200a (¶¶ 100-130).

Contrary to petitioners' contention (at 57-58) that "the complaint never alleges that B&W was the RICO enterprise," the complaint plainly and extensively alleges (at App. 188a-200a (¶¶ 100-130)) that petitioners acquired B&W using the proceeds of a pattern of racketeering activity. Petitioners err by looking solely at the phrasing of a single paragraph in Count 1 rather than the complaint in its entirety. *See* Pet. Br. 57-58 ("B&W is not so much as mentioned in Count 1 of the complaint.").

That blinkered focus on a single statement is inconsistent with the basic principles of notice pleading. *See Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam) (noting under Federal Rules "it is unnecessary to set out a legal theory" in complaint) (internal quotations omitted). Accordingly, "[w]hen, as in this case, plaintiffs have 'informed [the defendant] of the factual basis for their complaint, they [are] required to do no more to stave off threshold dismissal for want of an adequate statement of

their claim.'" *Smith v. Campbell*, 782 F.3d 93, 99 (2d Cir. 2015) (quoting *Johnson*, 135 S. Ct. at 347) (first alteration added).

Second, petitioners also violated Sections 1962(a) and (b) by investing the proceeds of a pattern of racketeering activity in what the complaint calls the "RJR Money-Laundering Enterprise," App. 251a-253a (¶¶ 162-163), and acquiring and maintaining an interest in that enterprise through a pattern of racketeering activity, App. 254a-255a (SAC ¶ 168). The district court found, using an incorrect legal standard derived from *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), that the RJR Money-Laundering Enterprise was foreign. *See* App. 51a-52a. That holding was error. The district court omitted addressing the RJR Money-Laundering Enterprise's extensive presence in and connection to the United States, including the fact that the American RJR defendants were an integral part of the enterprise, App. 237a-250a (¶¶ 157-159), and directed and controlled the enterprise from the United States, *see, e.g.*, App. 162a (¶ 49) ("The RJR DEFENDANTS, jointly and as individual corporations, control, direct, encourage, support, promote, and facilitate [the relevant] criminal activities"); App. 256a (¶ 172).

The court of appeals never ruled on the domestic nature of the RJR Money-Laundering Enterprise, and this Court should reject petitioners' invitation (at 57) to resolve the issue in the first instance.[8]

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[8] Contrary to petitioners' passing contention (at 57), respondents did not waive any argument relating to this issue. The certiorari petition never made an argument relating to the application of the *Hertz* test, and respondents were therefore under no obligation to address in their brief in opposition a

Accordingly, if this Court determines that issue to be dispositive of any aspect of this case, it should remand the case to the court of appeals to address the question. *See* Pet. Br. 60 (arguing in the alternative for remand).

2. Petitioners also violated Section 1962(c) with respect to a domestic enterprise. *First*, petitioners conducted the affairs of the RJR Money-Laundering Enterprise (itself a domestic enterprise) through a pattern of domestic racketeering activity. *See supra* p. 21. *Second*, each petitioner individually conducted the affairs of the association-in-fact including the group of American RJR entities. That association-in-fact is plainly domestic. Indeed, petitioners themselves suggest (at 40) that a domestic RICO claim may be sustained on the basis of a "distinct domestic enterprise" composed of the American "emissaries" of a larger transnational enterprise. The complaint clearly alleges facts supporting that legal theory. *See, e.g.*, App. 184a-185a (¶¶ 91-93).

C. Respondents May Recover For Their Injuries From Petitioners' Domestic Conduct, Wherever Those Injuries Arise

The complaint's allegations that American defendants engaged in domestic misconduct relating to domestic enterprises support a claim for damages wherever those damages occur. Courts have long recognized that a plaintiff may recover in American courts for injuries sustained abroad that are caused by such domestic conduct. *See, e.g., Sedima, S.P.R.L.*

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legal argument not passed upon by the court of appeals and not raised by the petition. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011).

v. Imrex Co., 473 U.S. 479 (1985) (civil RICO case for injuries suffered in Belgium); *Armendiaz v. Stillman*, 54 Tex. 623, 628 (1881) ("the action may be maintained" in an American court where the "act causing the damage was committed in [Texas], where the suit is brought, and not in Mexico, where the damage was sustained"). Respondents may therefore recover in an American court for the injuries, wherever located, they suffered by reason of petitioners' unlawful conduct committed in the United States.

Because respondents' claims are based on domestic misconduct committed by American defendants, those claims do not constitute an extraterritorial application of RICO. The presumption against extraterritoriality, therefore, does not foreclose the complaint from advancing past the pleadings stage.

II. THE ADDITIONAL ALLEGATIONS IN THE COMPLAINT FALL WITHIN RICO'S EXTRATERRITORIAL SCOPE

A. RICO Applies Extraterritorially With Respect To Certain Predicate Crimes

1. A statute applies abroad where Congress has provided a "clear indication of an extraterritorial application." *Morrison*, 561 U.S. at 255. Although "Congress *ordinarily* legislates with respect to domestic, not foreign matters," *id.* (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)) (emphasis added), that presumption yields where "there is the affirmative intention of the Congress clearly expressed," *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) ("*Aramco*") (internal quotations omitted).

This Court therefore gives a statute extraterritorial effect when the traditional tools of statutory interpretation indicate Congress intended that its enactment apply abroad. In *Morrison*, the Court rejected the claim that "the presumption against extraterritoriality is a 'clear statement rule,' if by that it is meant a requirement that a statute say 'this law applies abroad.'" 561 U.S. at 265 (citation omitted). Instead, it emphasized that "[a]ssuredly context can be consulted as well" and confirmed that a court should rely on "whatever sources of statutory meaning . . . give 'the most faithful reading' of the text." *Id.* (citation omitted). As this Court recently reaffirmed, a "canon of interpretation [that] requires an unmistakable statutory expression of congressional intent . . . [has] never required that Congress use magic words." *FAA v. Cooper*, 132 S. Ct. 1441, 1448 (2012). Rather, the Court "require[s] [only] that the scope of Congress' [intent] be clearly discernable from the statutory text in light of traditional interpretive tools." *Id.* Accordingly, this Court repeatedly has relied on the full range of "sources of statutory meaning" to discern Congress's intention regarding the territorial scope of a statute. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013); *Morrison*, 561 U.S. at 262; *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176-77 (1993); *Foley Bros. v. Filardo*, 336 U.S. 281, 285-86 (1949).

2. Congress provided a "clear indication" that RICO applies extraterritorially in certain limited circumstances. By incorporating predicate crimes with express extraterritorial effect into RICO's definition of "racketeering activity," Congress left no doubt that the conduct constituting a "pattern of

racketeering activity" may take place abroad to the extent that the particular predicate crimes at issue themselves apply extraterritorially.

The Court "begin[s], of course, with RICO's text, in which Congress followed a pattern of utilizing terms and concepts of breadth." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989) (internal quotations and alteration omitted). Section 1962 proscribes engaging in a "pattern of racketeering activity" where an "enterprise" is the prize, victim, or vehicle of that unlawful conduct. 18 U.S.C. § 1962(a)-(c). Section 1961 in turn defines "racketeering activity" to include numerous predicate crimes with express extraterritorial effect, including several at issue in this case. *Id.* § 1961(1).

For example, Section 1961(1)(B) lists as a predicate crime 18 U.S.C. § 1956, "relating to the laundering of monetary instruments." *Id.* § 1961(1)(B). Section 1956 prohibits the transfer of money "to a place in the United States from or through a place outside the United States" intending to promote unlawful activity or knowing that the funds were proceeds of unlawful activity, *id.* § 1956(a)(2), and expressly provides for "extraterritorial jurisdiction" in certain circumstances, *id.* § 1956(f). Similarly, Section 1961(1)(G) specifies as a predicate "any act that is indictable under any provision listed in section 2332b(g)(5)(B)," *id.* § 1961(1)(G), which includes 18 U.S.C. § 2339B, "relating to providing material support to terrorist organizations," *id.* § 2332b(g)(5)(B). Section 2339B(d) provides for "extraterritorial jurisdiction" "over an offense" when certain criteria are met. *Id.* § 2339B(d). Congress's inclusion of these extraterritorial predicate crimes was intentional: it enumerated dozens

of such predicates, including numerous terrorism-related predicates added to RICO in the Patriot Act as part of Congress's calculated effort to combat terrorist organizations at home and abroad. *See* U.S. Br. App. B (listing "Selected RICO Predicates With Extraterritorial Application").

RICO's text thus speaks with clarity that a "pattern of racketeering activity" may arise out of conduct abroad that violates predicate statutes that themselves apply extraterritorially. Congress's enumeration of those predicates in RICO's text is an express and unmistakable statement that certain extraterritorial conduct falls within its prohibition. This Court has recognized that a statute speaks clearly when it incorporates by reference the terms of another statutory provision. *See, e.g., United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984) ("Congress' intent . . . is most clearly demonstrated by the procedural mechanisms it established . . . [by] incorporat[ing] by reference the procedures of [a separate provision]."). To hold otherwise here would be to ignore the "context" this Court insisted should be "consulted" and to impose just the sort of "clear statement," magic-words requirement rejected in *Morrison*. 561 U.S. at 265.

Moreover, any interpretation that denies RICO's extraterritorial scope cannot be reconciled with Congress's enumeration of predicate crimes that apply *only* overseas. *See, e.g.*, 18 U.S.C. § 2332(a) (homicide of "a national of the United States, while such national is outside the United States"); *id.* § 2332a(b) (use of "a weapon of mass destruction outside of the United States"); *id.* § 2340A(a) (torture committed "outside the United States"). Congress's

inclusion of those predicate crimes in Section 1961(1)'s definition of "racketeering activity" would have been pointless if RICO's substantive prohibitions could not encompass a "pattern of racketeering activity" involving violations of those predicates. This Court repeatedly has explained that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotations omitted). That principle applies with full force in applying the presumption against extraterritoriality. *See, e.g.*, *Sale*, 509 U.S. at 174 (avoiding interpretation that would render text "redundant"). Accordingly, because Congress's inclusion of extraterritorial predicate crimes in RICO is meaningful only if a pattern of racketeering activity may take place abroad to the same extent, RICO's text clearly demonstrates that Congress intended the statute to have a certain extraterritorial reach.

3. Petitioners do not seriously dispute that RICO applies to certain extraterritorial patterns of racketeering activity. *See, e.g.*, Pet. Br. 41 (RICO's "chain of incorporation . . . suggests that such foreign patterns are covered in connection with *domestic* enterprises"). *Cf. id.* at 42-43. Rather, they briefly speculate that Congress could have incorporated extraterritorial predicates without intending RICO to apply to conduct abroad, but that assertion conflicts with the statute's text. They first hypothesize (at 43) that Congress might have incorporated predicates that by their terms apply both domestically and abroad intending RICO to encompass only those predicates' domestic applications. That contention, however, manufactures a distinction where Congress made

none. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769 (2014) ("To give th[e] same words a different meaning for each category would be to invent a statute rather than interpret one.") (internal quotations omitted; alteration in original).

Petitioners' further suggestion (at 43) that "Congress could have meaningfully incorporated [predicates with exclusively extraterritorial effect] solely for when such offenses are part of a broader pattern whose overall locus is domestic" is similarly illogical. Petitioners do not explain how the "locus" of a pattern could be different than the location of the conduct that constitutes that pattern. Moreover, they appear to concede that overseas violations of extraterritorial predicates can be part of a "pattern of racketeering activity" but invent an atextual "overall locus of the pattern" requirement that Congress did not enact. If they mean to suggest that conduct violating an extraterritorial predicate can form part of a pattern of racketeering activity but only if some critical portion of the predicate acts occurs domestically, they again fabricate a condition that appears nowhere in the statute. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face").

4. The court of appeals correctly determined that the racketeering activity alleged in the complaint falls within RICO's geographic scope. The complaint alleges petitioners engaged in money laundering in violation of 18 U.S.C. § 1956, which by its terms applies extraterritorially in prescribed circumstances. *See* App. 239a-248a, 256a (¶¶ 159(a)-(i), 172). The complaint further alleges petitioners engaged in

material support of a foreign terrorist organization in violation of 18 U.S.C. § 2339B, which also expressly applies abroad. *See* App. 248a (¶ 159(j)). The court of appeals also correctly held, and petitioners do not dispute, that petitioners' mail fraud, wire fraud, and violations of the Travel Act were based on "domestic conduct." App. 20a. Accordingly, because all of the racketeering activity alleged in the complaint is either domestic or permissibly extraterritorial under RICO, respondents have stated a claim under the statute.

B. The "Enterprise" Need Not Be Domestic To State A Claim Under RICO

Petitioners are mistaken that RICO requires the "enterprise" – the prize, victim, or vehicle of the conduct the statute makes unlawful – to be domestic. When the presumption against extraterritoriality has been "answer[ed]" with respect to the statute's focus, *Morrison*, 561 U.S. at 266, no further limitations on the statute's territorial scope are warranted. *See id.* at 267 n.9 ("If § 10(b) [of the Securities Exchange Act of 1934] did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them."); *Pasquantino v. United States*, 544 U.S. 349, 371 (2005) (holding mail and wire fraud statute applies to scheme to defraud Canada of tax revenues abroad because conduct was domestic). Petitioners agree. *See* Pet. Br. 21 ("Where the matters that were Congress's 'focus' all occur domestically, the contested application is domestic even if other foreign contacts are present, and thus the presumption against extraterritoriality does not arise.") (citing *Pasquantino*, 544 U.S. at 371). Accordingly, the proper question is

whether RICO's focus is the racketeering conduct the statute makes unlawful. Once that proposition is demonstrated, it follows that Congress imposed no further requirement that the enterprise be domestic.

1. RICO's focus is on the conduct that Section 1962 makes unlawful

This Court has recognized that "the heart of any RICO complaint is the allegation of a pattern of racketeering activity." *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (emphasis omitted); *see also H.J. Inc.*, 492 U.S. at 236 ("RICO's key requirement [is] a pattern of racketeering"). RICO thus "seeks to regulate," *Morrison*, 561 U.S. at 267 (internal quotations omitted), the various ways that criminals can "infiltrate and corrupt" organizations through their unlawful conduct, 84 Stat. 923. Because that "conduct is what the Government is punishing in [RICO] prosecution[s]," *Pasquantino*, 544 U.S. at 371, "[t]hose acts are, when committed in the circumstances delineated in [Section] 1962(c), [the] activity which RICO was designed to deter," *Sedima*, 473 U.S. at 497 (internal quotations omitted); *see also Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("The object of civil RICO is . . . to turn [victims] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity."). The pattern of racketeering conduct identified by Section 1962 is therefore the statute's focus.

Congress understood the particular evils arising from organized crime using its "money and power . . . *to infiltrate and corrupt* legitimate business and labor unions and to subvert and corrupt our democratic processes." 84 Stat. 923 (emphasis added). *Cf.* Pet. Br. 28-29. This express legislative purpose demonstrates

that Congress enacted RICO to attack the means by which criminals expand the reach of organized crime and not to serve as a catch-all series of regulations for "enterprises."

Section 1962's subsections address those criminal means by targeting three ways Congress recognized criminals could "infiltrate and corrupt" organizations through coordinated patterns of criminal conduct. First, Congress made it unlawful to "use or invest . . . the proceeds" of "a pattern of racketeering activity" to "acqui[re,] . . . establish[] or operat[e]" an enterprise. 18 U.S.C. § 1962(a). Second, Congress made it unlawful "to acquire or maintain . . . control of any enterprise" "through a pattern of racketeering activity." *Id.* § 1962(b). Third, Congress made it unlawful to "conduct [an] enterprise's affairs through a pattern of racketeering activity." *Id.* § 1962(c). In each subsection, Congress proscribed certain patterns of racketeering activity that target enterprises – a manifest indication that Congress's concern was eradicating the patterns of racketeering activity that criminals use to run and grow their criminal operations.[9]

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[9] Sections 1962(b) and (c) proscribe engaging in a pattern of racketeering activity either to acquire or to conduct the affairs of an enterprise. The conduct made unlawful by Sections 1962(b) and (c) – the acquiring or conducting – necessarily occurs in the same place as the pattern of racketeering activity through which a criminal does the acquiring or conducting. By contrast, Section 1962(a) makes unlawful the distinct conduct of investing the proceeds of a pattern of racketeering activity to obtain an interest in an enterprise. *See Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 321 (2d Cir. 2011). The pattern of racketeering activity that generates those proceeds may occur in a different location from where the subsequent investment of the proceeds is made. Because petitioners' investment of the proceeds of their pattern of racketeering activity to acquire

RICO thus focuses on the verbs, not the nouns, of its statutory prohibitions.

Petitioners therefore fundamentally misunderstand RICO's structure by arguing (at 31) that RICO "does not target stand-alone patterns of racketeering" to infer that "the statute [does not] focus[] on racketeering *simpliciter*." Section 1962 concerns the patterns of racketeering activity not because it criminalizes "racketeering *simpliciter*," Pet. Br. 31. Rather, Section 1962's focus is to make it unlawful to "invest" the proceeds of "a pattern of racketeering activity" in an enterprise; "acquire or maintain . . . control" of an enterprise "through a pattern of racketeering activity"; and "conduct [an] enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). Section 1962 thus makes unlawful the investing of proceeds *of*, the acquiring of control *by*, and the conducting of affairs *through* patterns of racketeering activity. Prohibiting that conduct is the statute's focus.

Section 1962's prohibition therefore reaches a defendant who acquires control or conducts the affairs of an enterprise through a domestic pattern of racketeering activity, regardless of whether that enterprise is "located" in the United States or abroad. And, because Section 1962 makes no distinction in the scope of its application among the predicate crimes on which a violation is based, there is no warrant to impose a distinct requirement that the

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their controlling interest in the domestic assets of B&W indisputably took place in the United States, the Court need not decide in this case whether the focus of Section 1962(a) is the pattern of racketeering activity itself or the investment of the proceeds of that racketeering. *See* App. 13a-14a n.5.

enterprise be domestic when a defendant's pattern of racketeering involves extraterritorial conduct within RICO's permissible geographic scope.

This Court's cases support the conclusion that Section 1962 focuses on the proscribed conduct. *Cf. Morrison*, 561 U.S. at 266 (recognizing focus of Section 10(b) is "deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered'") (quoting 15 U.S.C. § 78j(b)). In *Foley*, this Court held that the Eight Hour Law, which limits the workday for employees of contractors engaged by the United States, did not apply to work performed in Iran and Iraq. 336 U.S. at 285. Both the worker and the contractor were American, but the Court recognized that the statute regulated, and therefore focused on, the work performed rather than the entities engaged in the employment transaction. Similarly, in *Aramco*, the Court held that Title VII did not "apply to United States citizens employed by American employers outside the United States" because the statute's focus was again on the discriminatory employment itself rather than on either the victim or the perpetrator of the alleged violation. 499 U.S. at 248, 257. And, in *Pasquantino*, the Court held that the wire fraud statute applied to a scheme "us[ing] U.S. interstate wires . . . to defraud a foreign sovereign of tax revenue." 544 U.S. at 371. The Court explained that this application "of the wire fraud statute does not give it 'extraterritorial effect,'" even though the entity defrauded was a foreign sovereign, because the "domestic element of petitioners' conduct is what the Government is punishing in th[at] prosecution."

Id. Those cases recognize that Congress typically focuses on the situs of the relevant conduct rather than the location of the entities subject to that regulation.

Finally, petitioners' position conflicts with the logic of the statute and entails perverse outcomes that Congress could not have intended. Petitioners' interpretation would mean that RICO could not reach the agents or employees of a foreign enterprise who enter the United States to conduct its affairs through domestic patterns of racketeering activity. Congress had no reason to enact a statute that provides powerful criminal sanctions and civil remedies to combat domestic racketeering relating to a domestic enterprise but that would be inapplicable to the exact same conduct when committed in service of a foreign entity operating on American soil. Petitioners' attempt to limit RICO to domestic enterprises is especially illogical with respect to the terrorism-related predicates that Congress added to RICO as part of the Patriot Act. Petitioners offer no persuasive reason why Congress would have enacted those provisions to target only domestic terrorist enterprises and to exclude RICO's application to the very organization whose attack had inspired Congress to act. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982) (Court will not adopt interpretation that "would produce an absurd and unjust result which Congress could not have intended").

2. Petitioners' contrary contention that RICO focuses on the enterprise is incorrect

Petitioners' assertion that Congress focused on the enterprise is unpersuasive, as even they ultimately

concede. Petitioners themselves reveal Congress's critical focus on the *conduct* Section 1962 makes unlawful by repeatedly referring to RICO's target as the "corrupt infiltration and control of businesses," "enterprise corruption," and the like. *See, e.g.*, Pet. Br. 26 ("RICO's innovation was therefore to focus on how organized crime would corrupt 'enterprises.'") (citation omitted); *id.* at 29 ("[T]he statutory structure tracks the various ways organized crime typically co-opts and controls businesses, unions, and other organizations."); *id.* at 44 (Section 1962 "operates to *prohibit the wrongful conduct* of corrupting enterprises in specified ways").

That consistent phrasing is telling. Even when petitioners try to emphasize the enterprise, the logic of the statutory text compels a focus on the racketeering activity that criminals use to infiltrate and corrupt organizations. Indeed, petitioners concede their case: "[I]t is the *corrupting influence on the enterprise* that is ultimately the touchstone for RICO liability; that is the common focus of [Section] 1962." *Id.* at 30; *see also id.* at 34 ("the indisputable focus of [Section] 1962 is on preventing the corruption of enterprises").

Petitioners' attempts to avoid the implications of that core concession lack merit.

a. Petitioners err in suggesting (at 26-28) that RICO's text evinces a focus on the enterprise rather than on the pattern of racketeering activity. *First*, petitioners mistakenly rely on RICO's title to support that claim. This Court previously rejected the argument that "RICO's broad language should be read narrowly so that the Act's scope is coextensive" with "Congress' purpose in enacting RICO" as allegedly

"revealed in the Act's title." *H.J. Inc.*, 492 U.S. at 245. Moreover, petitioners attempt (at 26-27) to prove their point simply by italicizing the word "Organizations." But that simply ignores the other three words in RICO's title, which (if anything) emphasize Congress's focus on criminals' "racketeer[ing]" to "influence[]" and "corrupt" those organizations.

Second, petitioners draw an incorrect conclusion from RICO's enacted purpose. They recognize that Congress sought to combat the practices of "organized crime" who "infiltrate and corrupt" various other organizations. 84 Stat. 922-23. But, as explained above, *see supra* pp. 30-31, that statement only confirms Congress's focus on the evil it sought to prevent: the infiltration and corruption of those organizations through patterns of racketeering activity.

Third, petitioners attempt (at 27) to divine RICO's focus from Congress's decision in Section 1962 to ground its legislative authority on "enterprises" that affect or engage in commerce rather than on racketeering activity that affects commerce. But this Court rejected just such an attempt to "deduce[] by inference from boilerplate [jurisdictional] language which can be found in any number of congressional Acts" "[t]he intent of Congress as to the extraterritorial application of [a] statute." *Aramco*, 499 U.S. at 250-51. As the Court observed, such "reliance on [a statute's] jurisdictional provisions" "finds no support in our case law." *Id.* at 251; *see also Morrison*, 561 U.S. at 262-63. Those cases rejected an inference of extraterritorial effect from a jurisdictional reference to foreign commerce, but petitioners offer no reason why jurisdictional boilerplate should be disregarded for that purpose and considered probative here.

b. Petitioners' argument based on the statute's purpose and history also misstates RICO's focus. Petitioners note (at 28) that RICO's "major purpose" was "to address the infiltration of legitimate business by organized crime." *United States v. Turkette*, 452 U.S. 576, 591 (1981); *see also Russello v. United States*, 464 U.S. 16, 28 (1983) (RICO targeted "organized crime['s]" "corrupting influence"). And petitioners rely (at 28-29) on RICO's legislative history for the claim that the statute's purpose was "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 91-617, at 76 (1969); *see* H.R. Rep. No. 91-1549, at 57 (1970); *see also* Pet. Br. 29 (citing an article explaining that RICO's "'emphasis on infiltration of legitimate organizations remained as [it] made its way through the legislative process'") (quoting Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661, 678 (1987)) (alteration in original). Those authorities, however, demonstrate that Congress was concerned with the *infiltration and control* of organizations using patterns of racketeering activity rather than the enterprises itself.

c. Petitioners' arguments based on RICO's structure also fail.

First, petitioners argue (at 29) that Section 1962's tripartite structure "confirms its focus on enterprise corruption" because it "tracks the various ways organized crime typically co-opts and controls" enterprises, and they hypothesize a "subordinate role of the predicate racketeering acts." This non-sequitur fails to apprehend that Section 1962 focuses on patterns of racketeering activity precisely because

they are the "various ways organized crime typically co-opts and controls" an enterprise.

Second, petitioners invoke (at 30) the irrelevant fact that the enterprise is not the "perpetrator" of Section 1962's prohibitions. Petitioners' reasoning reduces to the idea that the focus of every criminal statute is the victim rather than the conduct the statute proscribes, a notion this Court's cases refute. *See, e.g., Pasquantino*, 544 U.S. at 371; *Aramco*, 499 U.S. at 247, 255.

Third, petitioners suggest (at 31) that, because RICO's predicate acts are independently illegal, the conduct Section 1962 makes unlawful does not "need to be" its focus. By incorporating numerous illegal acts into RICO's proscriptions when they form a "pattern," however, Congress evidently thought otherwise. RICO's text and structure clearly trump petitioners' speculation about Congress's intent.

Fourth, petitioners observe (at 31) that Section 1962(a)'s exception for small investments is "keyed to the *de minimis* nature of the investment, not to the relative seriousness of the underlying racketeering activity." They then erroneously infer (*id.*) that the exception would be "capricious" if RICO's focus were on racketeering. The exception makes sense, however, because Section 1962's focus is on criminals' use of racketeering to infiltrate and corrupt organizations. If that infiltration and corruption is minimal – like a mobster buying a few shares of a publicly traded company – then Congress could sensibly exempt such conduct as a trifling instance of the evil it sought to prevent. Nothing in that choice undermines the conclusion that Congress was

focused on the conduct, a *de minimis* subset of which it excluded from the scope of RICO's prohibition.

d. Finally, petitioners incorrectly point to two aspects of RICO's civil remedies in Section 1964 as support for their argument that the statute's focus is the enterprise.

First, petitioners note (at 33) Congress's failure to enact a specific provision authorizing "injunctions against the commission of future racketeering acts," an "omission" they deem "strange . . . if such acts were the focus of [Section] 1962." But Congress legislated against the background of a "general rule" that "the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992). In light of that principle, Congress's textual choice is unremarkable.

Second, petitioners suggest (at 34) that Section 1964(c)'s limitation on RICO's private right of action to recovery for injuries to "business or property," thus excluding personal injuries, indicates an "economic focus" that "would make little sense if the focus of [Section] 1962 were on racketeering activity as such." But Congress's limitation of Section 1964(c)'s civil remedy to economic losses (as opposed to personal injuries) resulting from a defendant's use of racketeering activities to infiltrate and corrupt an organization does not support petitioners' contention that Section 1962's focus is on the organization rather than the conduct that corrupts it.

Section 1962's focus is therefore the conduct it makes unlawful: investing in, acquiring control of, or conducting the affairs of an enterprise through a

pattern of racketeering activity. Accordingly, Section 1962 applies to a defendant's conduct so long as the pattern of racketeering activity through which it infiltrates or corrupts an enterprise is within RICO's territorial scope, regardless of where the enterprise may be located.

C. Respondents' Injuries Need Not Be Domestic To State A Claim Under RICO

Petitioners further contend erroneously that Section 1964(c) does not apply to injuries suffered abroad absent an express statement in the statute that foreign injuries fall within its scope. That contention demands a dramatic departure from centuries of precedent recognizing that foreign injuries may be redressed in American courts. In accord with that longstanding principle of law, Congress modeled Section 1964(c) on Section 4 of the Clayton Act – a provision that applies to foreign injuries. This Court should recognize that Section 1964(c) applies to foreign injuries as well.

Respondents consistently have advocated that this Court respect the important limitations on the application of U.S. law outside its borders by interpreting statutes to conform to customary international law limits on the exercise of the United States' prescriptive jurisdiction abroad. The court of appeals' interpretation of RICO is consistent with those limitations. Section 1962 applies abroad only to the same extent as its underlying predicates, which are carefully calibrated to comport with the Nationality Principle and the Protective Principle under international law. *See, e.g.*, 18 U.S.C. § 1956(f) (money-laundering statute applies to conduct abroad if committed by United States citizen). The additional restriction sought

by petitioners on a foreign plaintiff from recovering for injuries caused by an American citizen's violation of RICO, however, finds no basis in law. And the Solicitor General's suggestion to restrict RICO's scope to domestic injuries does not comport with a proper application of comity principles.

1. Longstanding precedent supports foreign plaintiffs' recovery of damages sustained abroad by American defendants' conduct in violation of U.S. law

American courts have always been open to foreign plaintiffs who suffer injuries abroad caused by an American defendant's unlawful conduct. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 706-07 (2004) (recognizing "traditional rule" that "a plaintiff injured in a foreign country" could bring suit "in American courts") (collecting cases); *Rasul v. Bush*, 542 U.S. 466, 484 (2004) ("The courts of the United States have traditionally been open to nonresident aliens."). That traditional rule is particularly clear and especially important with respect to an American's unlawful conduct committed on American soil that causes injury abroad. *See, e.g.*, *Sedima*, 473 U.S. at 497; *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975) (per curiam) (action against American munitions manufacturer for wrongful death caused by explosion in Cambodia of artillery round manufactured in United States); *Armendiaz*, 54 Tex. at 628 (suit for domestic misconduct causing injury in Mexico).

Congress enacted Section 1964(c) against the backdrop of that bedrock legal principle. *See Beck v. Prupis*, 529 U.S. 494, 500 (2000) ("turn[ing] to the well-established common law" principles to interpret

Section 1964(c)). Congress well understood that, under existing principles of tort law, a cause of action for unlawful conduct in one jurisdiction would reach injuries caused by that conduct in another jurisdiction. This Court has explained that, "[i]n order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citation omitted). Petitioners would invert this principle to require instead a clear statement that Congress incorporated in Section 1964(c) the common-law rule that a cause of action may be brought for foreign injuries. There is no basis for that departure from precedent, especially because (as explained below) the international law principles of prescriptive comity on which this Court has based its extraterritoriality cases have no application to the interpretation of Section 1964(c).

The novelty of petitioners' claim that, absent an express indication to the contrary, a cause of action may recover only for domestic injuries is evident in its total absence from this Court's prior extraterritoriality jurisprudence. Not a single case even hinted that the fact that the injury occurred abroad was dispositive notwithstanding the statute's silence about foreign injuries. *See, e.g.*, *Kiobel*, 133 S. Ct. at 1666; *Morrison*, 561 U.S. at 262; *Aramco*, 499 U.S. at 255; *Foley*, 336 U.S. at 285-86. In all those cases, the injury was suffered abroad. If petitioners' newly discovered domesticity requirement were controlling, then those cases should have been resolved on that ground alone.

2. Congress intended RICO to reach foreign injuries

Section 1964(c) adopted the precise wording Congress had used previously in Section 4 of the Clayton Act. *Compare* 18 U.S.C. § 1964(c) *with* 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor"). This Court has "repeatedly observed that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 267 (1992) (citations omitted); *see also Rotella*, 528 U.S. at 557 ("there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration") (citing *Sedima*, 473 U.S. at 489).

This Court also has made clear that Section 4 of the Clayton Act encompasses injuries abroad. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978) ("Clearly, therefore, Congress did not intend to make the treble-damages remedy available only to consumers in our own country."). That understanding was firmly in place in 1970 when Congress enacted RICO. *See, e.g., Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 215 (1966) (suit under Clayton Act § 4 against shipping companies for collusive pricing of rates for shipping condensed milk to Philippines); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707-08 (1962) (suit under Clayton Act § 4 could recover for injuries in Canada). This Court "may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used . . . in the Clayton

Act's § 4." *Holmes*, 503 U.S. at 268. Because "[i]t used the same words, . . . [Congress] intended them to have the same meaning that courts had already given them." *Id.* Accordingly, when Congress enacted Section 1964(c) using Section 4 of the Clayton Act as its model, it did so intending Section 1964(c) to apply to foreign injuries.[10]

Contrary to petitioners' contention (at 51 n.6), this Court clearly recognized in *Pfizer* that Section 4 extends to foreign injuries. The Court reasoned that "an exclusion of all foreign plaintiffs would lessen the deterrent effect of treble damages." 434 U.S. at 315. The danger, the Court explained, was this: "[i]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home." *Id.* The risk posed by "extort[ing]" "illegal profits" "abroad" is addressed only by interpreting Section 4 to force "potential antitrust violators to take into account the full costs of their conduct," including harm caused in

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[10] Congress confirmed its intention that Section 1964(c) applies to injuries abroad when it amended RICO in 2001 as part of the Patriot Act. Senator Kerry made clear that Congress's action "confirm[ed] that our money laundering statutes prohibit anyone from using the United States as a platform to commit money laundering offenses against foreign jurisdictions in whatever form that they occur." 147 Cong. Rec. 20,669, 20,710 (2001). And he emphasized that Congress would "continue to give [its] full cooperation to our allies in their efforts to combat smuggling and money laundering, *including access to our courts and the unimpeded use of our criminal and civil laws.*" *Id.* (emphasis added).

foreign countries. *Id.* The Court accordingly held the Government of India could recover under Section 4 for injuries indisputably suffered in India.[11]

This Court thus applied Section 1964(c) in a case involving purely foreign injuries. In *Sedima, S.P.R.L. v. Imrex Co.*, a Belgian plaintiff sued American defendants under Section 1964(c) of RICO for injuries they suffered *in Belgium* by reason of a pattern of racketeering activity carried out in the United States. The Court rejected the defendants' proposal to limit Section 1964(c) to recovery of special "racketeering injury." 473 U.S. at 495. In so holding, the Court explained that, "[i]f the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under [Section] 1964(c)." *Id.* The fact that the racketeering activities injured the plaintiff exclusively in Belgium did not prevent the Court from holding that Section 1964(c) reached that injury. The Court in *Sedima* thus applied Section

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[11] In contrast to its current position, the Solicitor General in *Pfizer* endorsed Section 4's application to foreign injuries, explaining that, "[i]f the [sovereign plaintiff's] allegations had been made by a foreign businessman or foreign corporation, the plaintiff's capacity to sue would be undisputable." Memorandum for the United States as Amicus Curiae at 2-3, *Pfizer, Inc. v. Government of India*, *supra* (No. 76-749), 1977 WL 189361. The Government also has recognized that Congress modeled Section 1964(c) on Section 4 of the Clayton Act. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents at 12, *Bank of China, New York Branch v. NBM LLC*, 546 U.S. 1026 (2005) (No. 03-1559), 2005 WL 2875061 ("Section 1964(c) was modeled on the federal antitrust laws"). The Solicitor General does not even cite *Pfizer*, much less attempt to reconcile the Government's inconsistent positions.

1964(c) to foreign injuries, and it should do the same here.

Moreover, as the Second Circuit explained, *Sedima*'s analysis of Section 1964(c)'s "injury requirement," which "focuses on RICO's predicates," "dovetails with the extraterritoriality analysis" with respect to Section 1962. App. 57a. The court explained that, "[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad," there is "no reason to import a domestic injury requirement" into Section 1964(c). App. 57a-58a. The court thus sensibly held that Congress, by incorporating extraterritorial predicates into RICO's substantive prohibitions, intended that plaintiffs could recover for injuries proximately caused by conduct that violates those predicates abroad as well.

3. The Solicitor General's argument to limit Section 1964(c) to domestic injuries is unfounded

The sole basis of the Government's argument that this Court should interpret Section 1964(c) to include a domestic-injury requirement is to "avoid[] 'unintended clashes between our laws and those of other nations which could result in international discord.'" U.S. Br. 31 (quoting *Kiobel*, 133 S. Ct. at 1664). The Solicitor General claims the Executive Branch can exercise prosecutorial discretion to account for sensitive foreign-policy considerations but private parties have no incentive to exercise caution when bringing claims. This Court's cases preclude that argument.

a. The Solicitor General's proposed limitation would intrude on Congress's primacy in determining

the scope of statutory causes of action. This Court predicated its decision in *Kiobel* on the fact that *Congress* had not spoken on the scope of the private cause of action in the Alien Tort Statute ("ATS"), which by its terms is "strictly jurisdictional" and thus relies on judicial lawmaking to shape the contours of its cause of action. 133 S. Ct. at 1664; *see also Sosa*, 542 U.S. at 727 ("the potential implications for the foreign relations of the United States of recognizing [ATS] causes should make courts particularly wary of impinging on the discretion of the *Legislative and Executive Branches* in managing foreign affairs") (emphasis added). By contrast, the "danger of unwarranted judicial interference in the conduct of foreign policy [that was] magnified in the context of the ATS, because the question [was] not what Congress has done but instead what courts may do," is not implicated here because Congress *has* spoken. *Kiobel*, 133 S. Ct. at 1664.

The deference to Congress in matters of foreign affairs recognized in *Kiobel* thus counsels in favor of recognizing Section 1964(c)'s application to injuries abroad in accord with Congress's intent. Congress modeled Section 1964(c) on Section 4 of the Clayton Act, a preexisting statute that Congress understood applies to foreign injuries. It thus settled the question whether Section 1964(c) applies to such injuries as well. The Solicitor General asks this Court to override Congress's decision regarding the territorial scope of the cause of action due to the Executive Branch's policy preferences. That request raises serious separation-of-powers concerns and lacks any basis in this Court's cases. *See, e.g., Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147

(1957) ("Congress . . . alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."). This Court should therefore reject that attempt.

In any event, the canon of construction on which the Solicitor General relies (at 32) – that the Court "construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations," *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) – has no application to whether a cause of action applies to *injuries* abroad. Every case applying that canon did so when interpreting statutes that were ambiguous with respect to the geographic scope of their regulation of *conduct*. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455 (2007) (Court "assume[s] that legislators take account of the legitimate sovereign interests of other nations when they write American laws" because "[f]oreign conduct is generally the domain of foreign law") (internal quotations and alteration omitted); *Empagran*, 542 U.S. at 169 (invoking "prescriptive comity" to interpret ambiguous statute not to apply to certain "foreign conduct"); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953) (same). By contrast, as the Solicitor General agrees, Congress has expressly and unambiguously extended RICO's substantive prohibitions abroad. No case has applied the interpretive rule the Solicitor General invokes in the unorthodox manner he suggests: to limit a private cause of action to domestic injuries when the conduct that caused the injury is unambiguously unlawful and within the territorial scope of the statute's substantive prohibition.

For example, in *Empagran*, this Court relied on that canon to interpret the geographic scope of the Sherman Act's prohibition on anticompetitive conduct. 542 U.S. at 164. As respondents argued as *amici* in that case, the extension of the Sherman Act's substantive prohibition to anticompetitive conduct committed by foreign defendants in foreign countries against foreign victims was inconsistent with customary international law because it was not "reasonable." *Id.* at 164-66 (relying on "reasonableness" requirement in Section 403 of Restatement (Third) of Foreign Relations Law of the United States (1986) ("Restatement Third")). Those international law considerations are not relevant to the interpretation of Section 1964(c), which simply provides a civil cause of action for injuries resulting from conduct Congress already made unlawful in Section 1962. And, in contrast with the situation this Court confronted in *Empagran*, Section 1962's application here to predominantly domestic conduct committed by American defendants is plainly reasonable and therefore consistent with customary international law.

This Court's consistent application of the interpretive rule to determine the geographic scope *only* of a statute's substantive regulation of conduct is grounded in the principles of prescriptive comity on which it is based. The rule derives from international law limitations on the exercise of prescriptive jurisdiction abroad, which restricts only a sovereign's authority to proscribe conduct. *See Empagran*, 542 U.S. at 164 (relying on "principles of customary international law" to hold statute does not apply to certain "foreign conduct"); Restatement (Third) §§ 402, 403 (detailing circumstances in which "a state has jurisdiction

to prescribe law" outside its territory); *id.* § 401(a) (defining "jurisdiction to prescribe" as sovereign's authority "to make its laws applicable to the activities, relations, or status of persons"); *see also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) (the "canon ... is relevant to determining the substantive reach of a statute because 'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe") (citing Restatement (Third) §§ 401-416); *id.* at 817-18 ("Considering comity in this way is just part of determining whether the [statute] prohibits the conduct at issue.").

There is no comparable international law norm regarding the location of *injuries*. No recognized principle of international law limits a plaintiff from seeking a civil remedy for violations of laws that indisputably fall within a nation's prescriptive jurisdiction merely because the injuries occurred in a different jurisdiction. *See* Restatement (Third) § 421 (stating requirements for a court's "jurisdiction to adjudicate" civil cases). The Solicitor General thus asks this Court to invent a new principle of statutory interpretation grounded neither in precedent nor in the international law on which that precedent rests.

That new presumption would represent a stark departure from this Court's cases, which uniformly ground its consideration of "prescriptive comity" in international law. *See, e.g., Empagran*, 542 U.S. at 164 (grounding "rule of construction" in "principles of customary international law" that Court "assume[s] Congress ordinarily seeks to follow") (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64,

118 (1804)); *Lauritzen*, 345 U.S. at 577 ("By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."). The Solicitor General offers no persuasive reason for that radical departure from precedent.

The novelty – and danger – of the Solicitor General's position is exemplified by the fact that he purports to rely on comity to bar foreign plaintiffs from recovering for injuries suffered abroad by reason of an *American* defendant's unlawful *domestic* conduct. As Congress recognized in the antitrust context, "to deny [foreigners] this protection could violate the Friendship, Commerce and Navigation treaties this country has entered into with a number of foreign nations." H.R. Rep. No. 97-686, at 10 (1982). Those comity considerations apply with particular force with respect to RICO, on which the United States expressly relies for satisfying its international legal obligations to criminalize transnational organized crime.[12] By modeling Section 1964(c) on a provision it knew applied to foreign injuries, Congress took account of these comity considerations. The Solicitor General's view thus risks creating a

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[12] *See* United Nations Convention against Transnational Organized Crime (Palermo Convention), Nov. 15, 2000, 2225 U.N.T.S. 209; *Law Enforcement Treaties: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 60 (2004) (responses of Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, and Bruce Swartz, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, to additional questions) (explaining that RICO implements the obligations of Articles 5, 6, and 8 of the Palermo Convention).

conflict with Congress by undermining the very comity interests he purports to protect.

In sum, Congress determined that RICO's substantive provisions should apply both to domestic conduct and to certain conduct abroad. The Solicitor General does not dispute that Congress's decision to apply Section 1962 abroad is consistent with the requirements of prescriptive comity under international law. Because Congress enacted a substantive prohibition in Section 1962 that is consistent with the limitations on its prescriptive jurisdiction, neither international law nor this Court's interpretive canons require limiting RICO's private remedy in Section 1964(c) to domestic injuries caused by that unlawful conduct.

b. The Solicitor General's comity concerns in any event lack a factual basis, especially in this case. Respondents are 26 foreign sovereigns and the European Community that have filed *amicus* briefs in this Court in prior cases emphasizing the important limits on the extraterritorial reach of American statutes. *See, e.g.*, Brief of the European Commission on Behalf of the European Union as *Amicus Curiae* in Support of Neither Party, *Kiobel v. Royal Dutch Petroleum Co.*, *supra* (No. 10-1491), 2012 WL 2165345; Brief of *Amicus Curiae* the European Commission in Support of Neither Party, *Sosa v. Alvarez-Machain*, *supra* (Nos. 03-339 & 03-485), 2004 WL 177036. Respondents are satisfied that the complaint in this case, which alleges that American corporations engaged in a pattern of predominantly domestic racketeering activity that caused injury to respondents' businesses and property, comports with limitations on prescriptive jurisdiction under international

law and respects the dignity of foreign sovereigns. By contrast, forcing American corporations to appear in European courts applying European law to those defendants' misconduct on American soil "could have serious ramifications for foreign relations." U.S. Br. 30. In respondents' view, the foreign-policy implications of bringing this suit against a U.S. corporation in a U.S. court under U.S. law are far less serious than they might be were 26 European Member States to bring multiple suits against the same U.S. corporation under different European laws.

To the extent the extraterritorial application of RICO in other contexts could give rise to comity concerns not present in this case, those concerns are adequately addressed through other legal doctrines (inapplicable here) that would limit the litigation in American courts of cases that should properly be brought elsewhere.

First, the doctrine of *forum non conveniens* operates to ensure that cases are litigated in the most practically convenient forum. When an alternative forum is available, courts weigh private and public factors including the home of the parties, the ease of access to proof, the "'local interest in having localized controversies decided at home,'" and the avoidance of difficult applications of foreign law to determine whether litigation in American courts is proper. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 & n.6 (1981) (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)). That practical inquiry may preclude the litigation in American courts of claims, unlike those in this case, brought by foreign plaintiffs against foreign defendants for conduct abroad.

Second, this Court recently re-emphasized that due process restricts the exercise of general personal jurisdiction over foreign defendants and thereby protects them from suit based on conduct abroad in many cases. *See Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). The Court explained that those restrictions play an important role in minimizing "risks to international comity" where "[c]onsiderations of international rapport . . . reinforce [the] determination that subjecting [a foreign defendant] to the general jurisdiction of [American courts] would not accord with the 'fair play and substantial justice' due process demands." *Id.* at 763 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850-51 (2011). Because petitioners are all American corporations accused of misconduct in the United States, none of the comity considerations applicable in *Daimler* is implicated here.

Third, international law imposes limits on the extraterritorial exercise of prescriptive jurisdiction in circumstances not present here. Insofar as the claims against petitioners are partly based on extraterritorial conduct, those claims comport both with the Nationality Principle, which authorizes a sovereign to regulate the conduct of its own nationals abroad, and with the Protective Principle, which authorizes a sovereign to regulate conduct abroad that threatens its security. *See* Restatement (Third) § 402. Under *Charming Betsy*, a court should interpret RICO to apply in a manner that is consistent with international law. *See* 6 U.S. (2 Cranch) at 118 ("an act of Congress ought never to be construed

to violate the law of nations if any other possible construction remains"). Should either the Government or a private plaintiff seek to apply RICO in a manner that is inconsistent with international law limitations on prescriptive jurisdiction, courts in the United States are required to interpret the extraterritorial reach of RICO consistent with *Charming Betsy*.

These legal doctrines independently bar suits that might implicate the comity considerations raised by the Solicitor General. The Solicitor General instead invokes those foreign-relations considerations to exclude *all* suits to redress foreign injury caused by domestic conduct of American defendants, which is hardly solicitous of international comity or respectful of foreign interests.[13] Denying foreign citizens the ability to obtain relief in American courts for the foreign consequences of the domestic misconduct of American defendants may leave them without any remedy. Indeed, that policy would effectively immunize American companies for the injuries they cause abroad. As Congress has recognized, that outcome would be more destructive to international comity

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[13] Opposing legislation that would have overturned the result in *Pfizer*, the then-Deputy Legal Adviser testified that "the foreign policy interests of this Government are best served by continuing as we have for so many years to permit foreign sovereigns unimpeded access to our courts, just as we expect to have unimpeded access to theirs." *Clayton Act Amendments of 1978: Hearing and Markup Before the Subcomm. on International Economic Policy and Trade of the H. Comm. on International Relations*, 95th Cong. 7 (1978) (testimony of Lee R. Marks). In that testimony, Mr. Marks noted that the United States has brought suit in more than 50 jurisdictions (*id.* at 11), including a successful antitrust suit against a German utility under German law in Germany (*id.* at 11, 22). Reciprocal comity should therefore be extended to foreign states under U.S. law.

than the traditional principle that foreign injuries may be redressed in American courts. *See* H.R. Rep. No. 97-686, at 10. Accordingly, the Court should reject the Solicitor General's invitation to overturn Congress's considered judgment in enacting Section 1964(c) to encompass foreign injuries.

4. Petitioners' attempt to divine a limitation to domestic injuries lacks merit

Petitioners unpersuasively attempt to read (at 48) Section 1964(c) "as limited to domestic injuries."

First, petitioners err in asserting (at 48) that "choice-of-law principles strongly support a domestic-injury limitation to civil RICO." They misread *Sosa v. Alvarez-Machain*, which interpreted the express exception of the Federal Tort Claims Act ("FTCA") to the waiver of sovereign immunity for claims "arising in a foreign country." 28 U.S.C. § 2680(k). This Court, applying background choice-of-law principles, held that a claim "arises" where the injury was suffered, and so the exception bars claims under the FTCA where the injury is suffered abroad. 542 U.S. at 705.

If petitioners were correct that civil causes of action never apply to foreign injuries absent an express statement, however, then the FTCA's foreign-country exception would have been unnecessary because the FTCA already would have been inapplicable to foreign injuries. Moreover, the relevant choice-of-law principle when the FTCA was enacted in 1946 was *lex loci delicti*: "courts generally applied the law of the place where the injury occurred." *Id.* (citing Restatement (First) of Conflicts of Laws § 379 (1934), which determined defendant's liability based on "the law of the place of wrong"). The Court

explained that "[t]he application of foreign substantive law . . . was . . . what Congress intended to avoid by the foreign country exception" for the simple reason that it did not want to subject the United States *as defendant* to foreign law. *Id.* at 707. *Sosa* thus had nothing to do with foreign injuries as a general matter; it concerned only the scope of the express limitation on the FTCA's cause of action for common-law tort claims applying foreign law *against the Government* for foreign injuries. Accordingly, the choice-of-law considerations present in *Sosa* are wholly absent here, where the cause of action is not a common-law tort, the defendant is not the United States, and Section 1964(c) contains no analogue to the foreign-country exception.

Petitioners' reliance (at 49) on *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), is similarly misplaced. The Court there held that, because the plaintiff's claims arose out of an "episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria," *id.* at 396, they did not fall under the exception to the Foreign Sovereign Immunities Act of 1976 ("FSIA") for actions "'based upon a commercial activity carried on in the United States,'" *id.* at 394 (quoting 28 U.S.C. § 1605(a)(2)). That holding is irrelevant here because Section 1964(c) contains no analogous limitation.

Petitioners thus err in suggesting (at 50) that "RICO should be construed to preserve" the place-of-injury rule for "tort or tort-like claims," which they apparently think requires imposing a domestic-injury requirement on Section 1964(c). Both cases petitioners cite to support that theory involve statutes –

the FTCA and the FSIA – that do not provide any substantive rule of decision and instead rely on the substantive law identified by choice-of-law principles. Those statutes further expressly limit the cause of action based on either where the suit "arises" or where the conduct the suit is "based upon" took place. Petitioners nowhere explain how choice-of-law principles are relevant with respect to RICO, which indisputably provides the substantive law in this case and contains no such limiting provision.

Second, petitioners mischaracterize (at 50) this Court's cases by claiming that it "has limited the applicability of antitrust law to foreign injuries." In *Empagran*, this Court considered the scope of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which expressly excluded from the Sherman Act's prohibition "'conduct involving trade or commerce . . . with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect'" on "domestic trade or commerce." 542 U.S. at 161 (quoting 15 U.S.C. § 6a). The Court held that the FTAIA's exclusion applies to foreign anticompetitive conduct insofar as it causes independent foreign harm. *Id.* at 159. But the Court said nothing about the application of Section 4 of the Clayton Act to foreign injuries caused by conduct that *does* fall within the Sherman Act's prohibition. Indeed, in enacting the FTAIA, Congress did "not exclude all persons injured abroad from recovering under the antitrust laws of the United States." H.R. Rep. No. 97-686, at 10. As the House report explained, when the Sherman Act's prohibition reaches certain anticompetitive conduct, "[f]oreign purchasers should enjoy the protection of our anti-

trust laws" "even if [they] . . . suffer economic injury abroad." *Id.* (citing *Pfizer*). Just as Section 4 of the Clayton Act provides a private cause of action to recover for foreign injuries caused by conduct reached and prohibited by the Sherman Act, Section 1964(c) creates a private cause of action to remedy foreign injuries caused by conduct that is unlawful under Section 1962.

Third, petitioners incorrectly claim (at 53) that "[a]bundant precedent rebuts" the court of appeals' conclusion that "the presumption against extraterritoriality cannot apply to questions of injury as opposed to conduct." Their analysis of that precedent is flawed. The Court's decision in *New York Central Railroad Co. v. Chisholm*, 268 U.S. 29 (1925), was based on limiting the scope of the substantive regulation of conduct rather than on the location of the injury. *See id.* at 32 ("[t]he carrier was subject only to such obligations as were imposed by the laws and statutes of the country where the alleged act of negligence occurred"). So, too, in *Lauritzen v. Larsen*, in which the Court explained it "c[ould] find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters" in "determining the law applicable to a claim of actionable wrong." 345 U.S. at 592-93. Both cases, therefore, involved an application of the presumption with respect to the location of the conduct that caused the injury, not on the location of the injury itself.

Congress therefore spoke clearly that it intended Section 1964(c) to allow the victims of RICO violations to recover for the injuries they suffer by reason of that unlawful conduct, wherever the

victims' injuries occur. Neither the Solicitor General's policy concerns nor petitioners' arguments refute Congress's clear intent. The Court should affirm the judgment below that Section 1964(c) allows redress for harms suffered abroad.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

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REPLY BRIEF FOR PETITIONERS

According to Respondents, civil RICO extends to claims that foreign *injuries* were caused by the corruption of foreign *enterprises* through foreign *patterns* of racketeering. Respondents cannot reconcile that foreign-cubed application with the presumption against extraterritoriality.

Under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), a statute's "focus"—the "object[ ]" of its concern—applies only domestically, absent a "clear indication" to the contrary. *Id.* at 255, 266-67. As we have shown, the focus of RICO's substantive prohibitions is the enterprise being corrupted through a racketeering pattern, and there is no clear indication that the prohibitions extend to foreign enterprises. Moreover, the focus of RICO's private cause of action is the resulting injury, and there is no clear indication that the cause of action extends to foreign injuries. Respondents fail to refute either showing.

As for RICO's cause of action, Respondents argue that the presumption against extraterritoriality is simply inapplicable, but there is no legal or logical basis for such an *ad hoc* exception to the general rule that each provision of a statute is presumptively focused on domestic concerns. Respondents also argue that there is a clear indication that § 1964(c) reaches foreign injuries, but the antitrust analogy upon which they rely actually refutes their position. Indeed, even the Government agrees that § 1964(c) redresses only domestic injuries.

As for RICO's prohibitions, Respondents argue that Congress clearly extended § 1962 to

extraterritorial patterns of racketeering by incorporating certain racketeering predicates with extraterritorial scope. Not only is that argument wrong on its own terms, but it does not even purport to show that Congress further extended § 1962 to the corruption of foreign enterprises, much less that it did so clearly. Nor are Respondents correct in arguing that such a clear indication is unnecessary because the focus of § 1962 is the pattern rather than the enterprise. While Respondents briefly suggest that the focus is the pattern, they quickly retreat to the position that the focus is the corruption of the enterprise. And though they nevertheless contend that what should matter is the location of the racketeering pattern used to corrupt the enterprise, what actually matters is the location of the enterprise being corrupted: the enterprise itself is the object of RICO's concern, not the racketeering pattern used to corrupt it. In sum, there is no basis for the implausible conclusion that Congress intended RICO to prevent foreign enterprises from being corrupted.

Finally, the RICO claims here must be dismissed, because the complaint does not allege either a domestic injury or a domestic enterprise. In fact, Respondents have abandoned any allegation of domestic injury, which alone justifies dismissal. Moreover, Respondents' belated attempts to allege domestic enterprises cannot be reconciled with their own complaint and prior briefs.

I. SECTION 1964(c) REQUIRES A DOMESTIC INJURY, WHICH RESPONDENTS DO NOT ALLEGE

Respondents do not allege any domestic injuries. Resp.Br. 22-23. To the contrary, just last week, they dismissed with prejudice any "damages claims for domestic injuries under 18 U.S.C. § 1964(c)." Order at 2, *European Cmty. v. RJR Nabisco, Inc.*, No. 1:02-cv-05571 (E.D.N.Y. March 4, 2016). That alone justifies the dismissal of their RICO claims, if § 1964(c) does not redress foreign injuries.

And it does not, as the Government now agrees. Earlier this Term, one of the Respondents here itself recognized the presumption against federal civil claims for foreign injuries: "In *Kiobel*, *Empagran* and *Morrison*, this Court recently reemphasized a clear presumption against a cause of action created by a federal statute being construed to allow suit in U.S. courts by foreign plaintiffs for injuries suffered abroad." Br. of the Netherlands at 15, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015) (No. 13-1067). Section 1964(c) does not rebut this presumption.

A. Private Causes of Action Presumptively Do Not Redress Foreign Injuries

Respondents do not defend the Second Circuit's holding that the presumption against extra-territoriality applies only to substantive, conduct-regulating provisions. Nor could they, as this Court repeatedly has applied the presumption on a provision-by-provision basis, including to non-substantive provisions of a jurisdictional or procedural nature. Pet.Br. 45, 53-55; U.S.Br. 31.

Respondents instead argue that the presumption is subject to an *ad hoc* inversion solely for private causes of action, which they contend presumptively apply to foreign injuries. That is incorrect.

1. Respondents cite the "traditional rule" that "'a plaintiff injured in a foreign country' could bring suit 'in American courts.'" Resp.Br. 41-42 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 706-07 (2004)). However, the question here is not whether a plaintiff injured abroad *may sue* in American courts, but rather *what law will provide redress*. On that question, Respondents' own cases demonstrate that American law generally does not provide civil redress for foreign injuries. As *Sosa* explained, "[f]or a plaintiff injured in a foreign country, ... the presumptive choice in American courts under the traditional rule [has] been to apply foreign law." *See* 542 U.S. at 705-06. And that is so even when the challenged conduct occurred domestically. *See, e.g., id.* at 706-07, 709-10; *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam). In sum, the *relevant* "traditional rule" is precisely the opposite of what Respondents suggest.

Accordingly, Respondents prove our point by arguing that Congress must speak clearly to depart from background law. Resp.Br. 41-42. When Congress enacted RICO's private cause of action, foreign law governed civil suits to redress foreign injuries. Absent a clear indication that § 1964(c) departed from that background rule, it thus redresses only *domestic* injuries. Pet.Br. 48-50.

Respondents object that *Sosa* invoked choice-of-law principles only because the FTCA was not itself a source of substantive law, and that those principles

have nothing to do with the presumption against extraterritoriality. Resp.Br. 56-58. But this Court repeatedly has invoked choice-of-law principles to restrict the extraterritorial scope of federal statutory causes of action. *See, e.g.*, *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (interpreting Jones Act by reviewing factors "generally conceded to influence choice of law to govern a tort claim"); *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29, 31-32 (1925) (similar for FELA). That is unsurprising, as one goal of the presumption against extraterritoriality is to "protect against unintended clashes between our laws and those of other nations," *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013)—which could arise whenever a federal statute seeks to provide a cause of action for claims normally governed by foreign law.[1]

2. Respondents next contend that none of this Court's extraterritoriality cases has treated the location of injury as dispositive. Resp.Br. 42. But that contention is mistaken.

Among other cases, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), rejected a civil claim because it was based on "foreign injury." *Id.* at 158-59. Contrary to Respondents' suggestion

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[1] Contrary to Respondents' suggestion (Br. 56), the domestic-injury presumption does not render superfluous the FTCA's foreign-country exception at issue in *Sosa*. Rather, the presumption is what made the exception necessary. Without the exception, the FTCA's waiver of sovereign immunity would have exposed the United States to claims that were for foreign injuries, and thus governed by foreign law, which is what Congress wished to avoid. *See Sosa*, 542 U.S. at 707-08.

that the claim failed simply because it involved "foreign conduct," Resp.Br. 48, this Court made clear that the claim would have survived if the plaintiffs had suffered "domestic injury." *Empagran*, 542 U.S. at 158-59. Nor are Respondents correct that *Empagran* is inapposite because it was applying a 1982 amendment to the Sherman Act's substantive prohibitions, rather than applying the Clayton Act's remedial provisions. Resp.Br. 58-59. As this Court made clear, even before that amendment, the *Government* could seek *to enjoin* foreign conduct, but a *private plaintiff* still could not seek *damages* for foreign injury caused by that conduct. *See* 542 U.S. at 169-73. *Empagran* thus confirms that private damages actions are presumptively limited to domestic injuries, even if the underlying substantive law applies and is enforceable by the Government.

By contrast, Respondents prove nothing by observing (Br. 42) that other cases involving private claims for foreign injuries simply did not address the issue. "Questions which merely lurk in the record"—without being "ruled upon"—are "not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004). And that is especially true here because the cited cases *rejected* extraterritorial claims on other grounds, such as the lack of jurisdiction, *Kiobel*, 133 S. Ct. at 1663-64, or the inapplicability of substantive law, *Morrison*, 561 U.S. at 273; *Foley Bros. v. Filardo*, 336 U.S. 281, 284-85 (1949)—indeed, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 246-47 (1991), was not a private suit at all. This Court therefore had no need to decide

whether the claims were *additionally* barred because they sought redress for foreign injuries.

3. Respondents also assert that comity concerns are not implicated by providing federal civil remedies for foreign injuries caused by conduct that federal law substantively prohibits. Resp.Br. 48-55. But that is both irrelevant and wrong.

The presumption against extraterritoriality is based not only on comity, but also on "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 505 U.S. 197, 204 n.5 (1993). That is why this Court has applied the presumption even to procedural provisions that posed "no risk" of "conflict with the laws of other nations." *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993). The mere fact that the United States "would not violate ... international law" if Congress extended a statute abroad "in no way tends to prove that that is what Congress has done." *Morrison*, 561 U.S. at 272.

In any event, comity concerns are implicated whenever Congress imposes civil remedies for foreign injuries. As *Empagran* explained, "even where nations agree about primary conduct," they may "disagree dramatically about appropriate remedies"; courts thus "must assume" that Congress "would not have tried to impose" American civil remedies, for that would be, as this Court pointedly stated, "an act of legal imperialism." 542 U.S. at 167, 169. The Government reaffirms that point here: "private suits involving injuries suffered outside the [country] have a propensity to produce significant international friction," because "[o]ther nations may perceive our affording a private remedy to foreign

plaintiffs as circumventing the (often more limited) causes of action and remedies that those nations provide." U.S. Br. 33. This concern is amplified for civil RICO, a remedial scheme that has been aptly described as "the litigation equivalent of a thermonuclear device." *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991).

Indeed, some of the Respondents here made the same point as *amici* for *the defendants* in *Empagran*. They argued that "to apply [American] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody." 542 U.S. at 167. Now that the shoe is on the other foot, they ask this Court to eschew the presumption against extraterritoriality in favor of other doctrines that assertedly might mitigate comity concerns in particular cases. Resp.Br. 53-55. But *Empagran* rejected this type of "case by case" approach, because it would be "too complex" and lead to "lengthier proceedings," which in turn could "threaten interference with a foreign nation's ability" to enforce its own laws. 542 U.S. at 168-69. Moreover, the particular doctrines suggested by Respondents—*forum non conveniens*, due process, and international law—are principally designed to protect foreign defendants, not to prevent plaintiffs from bypassing the foreign remedial restrictions that properly govern their civil claims for foreign injuries.[2]

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[2] Likewise, Respondents clearly err in suggesting (Br. 51) that it would violate international law to deny them a domestic cause of action for any foreign injuries caused by domestic

B. There Is No Clear Indication That Civil RICO Redresses Foreign Injuries

Respondents do not dispute that the focus of § 1964(c) is the injuries Congress chose to redress. Pet.Br. 45-47; U.S. Br. 30-31. Nor do they dispute that the text of § 1964(c) provides no indication, much less a clear one, of extending to foreign injuries. Pet.Br. 47-48; U.S.Br. 33-34. Instead, Respondents argue that this Court has already treated foreign injuries as covered by RICO's civil cause of action and its antitrust analogue. That is incorrect.

1. Respondents principally assert that this Court's antitrust case-law "has made clear" that § 4 of the Clayton Act—upon which § 1964(c) was modeled—"encompasses injuries abroad." Resp.Br. 43-45. This antitrust analogy not only fails, but affirmatively supports our position.

The few antitrust cases cited by Respondents all presented different questions than whether § 4 of the Clayton Act extends to foreign injuries. *Pfizer, Inc. v. India*, 434 U.S. 308, 313 (1978) (whether a foreign sovereign is a "person" who may file civil antitrust claims); *Carnation Co. v. Pac. Westbound Conf.*, 383 U.S. 213, 215 (1966) (whether the Shipping Act of 1916 impliedly precludes antitrust laws); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 706-08 (1962) (whether the foreign state-action-

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(continued...)

conduct. As explained above, even where the challenged conduct is domestic, the "traditional rule" is that "a plaintiff injured in a foreign country" must rely upon "foreign law" for redress. *See Sosa*, 542 U.S. at 706-07, 709-10.

immunity defense was applicable). Such drive-by decisions are not binding holdings on the foreign-injury issue. *Cooper Indus.*, 543 U.S. at 170; *Empagran*, 542 U.S. at 171. Nor are they evidence, let alone clear evidence, of the background extra-territoriality law against which Congress enacted RICO in 1970—especially since Respondents' lead case, *Pfi er*, post-dated RICO by almost a decade.

Moreover, when this Court in *Empagran* later directly addressed a foreign-injury issue in the antitrust context, it refused to allow private plaintiffs to seek redress for foreign injuries caused by foreign conduct, and it found *no* contrary case from *any* court pre-1982. *See* 542 U.S. at 169-73. Thus, far from establishing that Congress clearly intended civil RICO to redress foreign injuries, antitrust case-law suggests precisely the opposite.

2. Like the Second Circuit, Respondents also invoke this Court's holding in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985), that § 1964(c) does not require any distinctive "racketeering injury." Resp.Br. 45-46. But the compensable *types* of RICO injuries have nothing to do with the *geographic scope* of such injuries. Pet.Br. 55-56; U.S.Br. 34. Nor does it matter whether the particular injuries alleged in *Sedima* were foreign, as the place of those injuries was irrelevant to the question presented, and to this Court's analysis of that question. *See* 473 U.S. at 493-500.

* * *

In sum, since RICO's private cause of action "gives no clear indication of an extraterritorial application" to foreign injuries, "it has none."

Morrison, 561 U.S. at 255. And since Respondents have abandoned any claim of domestic injury, this case can be resolved on that ground alone.

II. SECTION 1962 REQUIRES A DOMESTIC ENTERPRISE, WHICH RESPONDENTS DO NOT VALIDLY ALLEGE

Respondents contend there is a clear indication that RICO's substantive prohibitions apply extra-territorially, because Congress incorporated certain *predicate crimes* that apply extraterritorially. From this, Respondents conclude that § 1962 itself clearly extends to foreign *racketeering patterns* based on those predicates. Not only is that argument wrong on its own terms, but it provides no indication, much less a clear one, that § 1962 further extends to foreign *enterprises*. Because Respondents' clear-indication argument addresses only the racketeering predicates and patterns, it completely misses the mark if the focus of § 1962 is instead the enterprise.

As for the focus, every court to address the issue since *Morrison* has asked whether it is the *pattern* of racketeering activity or the *enterprise* corrupted by that activity. Pet. 19-22. And as we have shown, the text, context, and structure of RICO all make clear that § 1962 is focused on the enterprise. Pet.Br. 25-34. Indeed, neither Respondents nor the Government seriously argue otherwise. Although Respondents briefly suggest that § 1962 focuses on the racketeering pattern itself, they quickly retreat to the position that § 1962 focuses on the corruption of enterprises, but then argue that what matters is the location of the racketeering pattern used to corrupt the enterprise. By contrast, the Government

concedes that the enterprise is a focus of § 1962, but then argues that the racketeering pattern is another focus. Neither line of argument justifies the implausible conclusion that Congress intended RICO to prevent the corruption of foreign enterprises.

A. RICO's Focus Is The Enterprise, And It Thus Presumptively Applies Only To Domestic Enterprises

Respondents make two different arguments for why the enterprise is not a focus of RICO. Each is incorrect, and both would lead to untenable results. Nor does the Government fare any better with its alternative argument that the enterprise and the pattern are both foci of RICO.

1. To begin, Respondents directly argue that "the statute's focus" is "[t]he pattern of racketeering conduct." Resp.Br. 30. But their limited defense of that position is unpersuasive.

First, Respondents note that this Court has described the racketeering pattern as the "heart" of, and the "key" to, a RICO violation. *Id.* (quoting *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236 (1989)); *see also* U.S.Br. 21. But those cases merely underscored the distinction between the pattern and the underlying predicate acts: *Malley-Duff* refused to key the statute of limitations to the predicates, 483 U.S. at 154, and *H.J.* required continuity plus relationship among the predicates to establish a pattern, 492 U.S. at 236-37. These decisions in no way suggest that RICO focuses on racketeering patterns for their own sake, rather than for their corrupting influence on enterprises.

Second, Respondents suggest that RICO's harsh penalties were designed to "eradicat[e] ... patterns of racketeering activity" because the commission of predicate crimes is more harmful "when they form a 'pattern.'" Resp.Br. 31, 38; *see also* U.S. Br. 21-22. But that suggestion is irreconcilable with Congress's decision not to prohibit racketeering patterns *simpliciter*. Congress instead created a novel offense focused on the corruption of an enterprise, with the racketeering pattern playing only a subordinate, "predicate" role. Pet.Br. 25-26; *cf. Morrison*, 561 U.S. at 266-67 (a statute's focus was on certain securities transactions because it proscribed deception only "in connection with" them).

Third, Respondents deem it immaterial that Congress tied its legislative authority for RICO to the effect on commerce from the enterprise, rather than from the racketeering pattern. Resp.Br. 36. Respondents reason that, because this Court has "rejected an inference of extraterritorial effect from a jurisdictional reference to foreign commerce," it also should disregard "jurisdictional boilerplate" in determining a statute's focus. *Id.* But while generic commerce-clause language does not provide a *clear indication* that a statute extends *extraterritorially*, Pet.Br. 19, it does provide powerful evidence of the statute's *domestic focus*: the language identifies not only the "objects" that "the statute seeks to 'regulate,'" *Morrison*, 561 U.S. at 267, but also the objects that give Congress the constitutional power to regulate. RICO's jurisdictional hook thus underscores that Congress's focus was on the enterprise being corrupted, not the racketeering pattern used to corrupt it. Pet.Br. 27-28.

Finally, Respondents do not dispute—and indeed largely concede—that the remaining textual, contextual, and structural features of RICO that we have identified all point towards a focus on enterprise corruption, not on the racketeering pattern itself. *Compare* Resp.Br. 35-40, *with* Pet.Br. 26-34. One perfect example is the small-investment exception to § 1962(a). Respondents acknowledge that an individual who engages in an egregious "pattern" of racketeering activity, but then invests only a minimal amount of the proceeds in an "enterprise," does not violate § 1962(a). Respondents explain that "Congress could sensibly exempt such conduct *as a trifling instance of the evil it sought to prevent*." Resp.Br. 38 (emphasis added). They thus admit that the "evil" on which RICO focuses is the corruption of the *enterprise*, not the racketeering *pattern* used to corrupt it.

2. Despite ultimately conceding that RICO's focus is on enterprise corruption rather than racketeering patterns, Respondents advance a more circuitous argument for a place-of-the-pattern rule. Specifically, Respondents distinguish between the *enterprise* being corrupted and the *corrupting conduct* of investing in, acquiring, or directing the enterprise: they contend that the focus of RICO is the corrupting conduct, and that this conduct often "occurs in the same place as the pattern of racketeering activity." Resp.Br. 31-32 & n.9. This alternative argument is flawed at every level.

To begin, Respondents err by conflating the underlying racketeering pattern with the corrupting investment in, acquisition of, or direction of the enterprise. These are legally and factually distinct

elements that may occur in geographically distinct locations. Respondents admit as much for the corrupting investments prohibited by § 1962(a); for example, a racketeer may engage in a domestic pattern of gambling, but invest the proceeds abroad in a foreign enterprise. *Id.* 31 n.9. The same is true for the corrupting acquisitions prohibited by § 1962(b); for example, a racketeer may engage in a domestic pattern of extortion that coerces the victim to enter into a transaction abroad surrendering ownership of a foreign enterprise. As for § 1962(c), the corrupting conduct involves "directing the enterprise's affairs" through its "operation or management." *Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993); so, for example, a foreign enterprise may engage in a domestic pattern of mail fraud, but its chief executive may direct those affairs from its headquarters abroad. Respondents' reference to the corrupting investment, acquisition, or direction thus provides no support for tying § 1962's focus to the pattern.

Moreover, once the red herring of the pattern is eliminated, Respondents' proposed distinction between the *corrupting conduct* and the *enterprise corrupted* falls apart. Their attempt to separate the two contradicts the fundamental purposes of RICO and the presumption against extraterritoriality, both of which leave no doubt that what matters is the location of the enterprise itself.

Respondents contend that RICO "focuses on the verbs, not the nouns, of its statutory prohibitions." Resp.Br. 32. But the "enterprise" here is not just any noun. Rather, it is the *common object* of the verbs "invest" (§ 1962(a)), "acquire" (§ 1962(b)), and

"conduct" (§ 1962(c))—*i.e.*, the central "object[ ]" of RICO's "solicitude." *Morrison*, 561 U.S. at 267. RICO is obviously not a securities statute concerned with protecting the integrity of domestic investments and acquisitions for their own sake, even if they involve foreign enterprises. *Compare id.* at 261-70. Nor is it a statute concerned with domestic direction of foreign enterprises. Instead, Congress designed RICO to protect "the Nation's economic system," Pub. L. No. 91-452, 84 Stat. 922, 923 (1970), from the "corrupting influence" of organized crime in "channels of commerce," *Russello v. United States*, 464 U.S. 16, 28 (1983). When Congress prohibited racketeers from corruptly investing in, acquiring, or directing enterprises, it thus was focused on *domestic* enterprises, in accord with "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith*, 507 U.S. at 204 n.5.

Respondents cite a few cases for the proposition that a statute's focus is "typically" on regulated "conduct" rather than regulated entities. Resp.Br. 33-34. That is no doubt often true, but not invariably so. For example, if a corporate-governance statute required "any corporation" to "conduct" any shareholder meetings using certain procedures, it would more naturally be construed as focused on the corporation rather than the conduct of the meeting, and thus presumptively limited to domestic corporations rather than meetings domestically conducted. So too with RICO. Far from a typical federal statute, RICO was a unique innovation. It created a new crime based on predicate acts that are already illegal, but only to the extent those acts are used to corrupt an enterprise. *See generally* Gerard

E. Lynch, *RICO: The Crime of Being a Criminal*, 87 COLUM. L. REV. 661 (1987). As Judge Rakoff has explained, this construct reveals a "focus" squarely "on the enterprise as the recipient of, or cover for, a pattern of criminal activity." *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010); *cf. Morrison*, 561 U.S. at 266-67 (similarly holding that the focus of the securities statute at issue was not on deceptive conduct, but rather on the transaction whose integrity was threatened by the deception). Accordingly, since RICO's substantive prohibitions are focused on the enterprise, the relevant geographic fact is where *it* is located.

3. Extending RICO to foreign enterprises absent any clear indication that Congress so intended would produce implausible results. On Respondents' view, a domestic pattern of gambling or extortion would not violate RICO, but § 1962(a) and (b) would prohibit the racketeer from using such patterns to invest in or acquire a foreign enterprise. Likewise, a domestic pattern of mail fraud would not violate RICO, but § 1962(c) would prohibit the pattern if it was directed through the affairs of a foreign enterprise. All this would turn the presumption against extraterritoriality on its head, by imposing criminal liability for domestic conduct *solely* due to *additional foreign conduct*.

With respect to § 1962(a) and (b), Respondents do not even attempt to defend this backward result, and the Government's brief effort is unavailing. The Government contends that "a person who profited from domestic racketeering activity" should not be allowed "to avoid criminal RICO liability by pouring those profits into a foreign enterprise." U.S.Br. 23.

But if the purpose of § 1962(a) and (b) had been to deprive racketeers of their profits, then those provisions would have directly punished the racketeering patterns—and would not have allowed the racketeers to retain or spend their profits at all. Instead, though, § 1962(a) and (b) merely prohibit racketeers from investing in or acquiring an enterprise. The purpose of these provisions is thus not to punish the predicate crimes, but to "protect[ ]" the enterprise from becoming a "victim[ ]." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001). And the victimization of *foreign* enterprises was obviously not Congress's concern.

With respect to § 1962(c), Respondents assert that it would be "perverse" to allow foreign enterprises to conduct domestic racketeering patterns. Resp.Br. 34; *see also* U.S.Br. 20-21. But as we have shown, that naked policy argument, which bears on neither the focus nor the clear indications of RICO, is irrelevant as a legal matter and overblown as a practical matter. Pet.Br. 39-40. Respondents ignore that showing, and the Government's response is unpersuasive. The Government does not dispute that a terrorist cell like the 9/11 hijackers could constitute a domestic association-in-fact enterprise. U.S. Br. 28-29. And while it observes that a lone foreign agent might not violate RICO, *id.* 23 n.8, it does not dispute that such an individual still could be prosecuted under the predicate statutes for domestic criminal conduct, often with harsher penalties than RICO itself, *id.* 18. To be sure, the predicate statutes lack some of RICO's advantages for prosecutors, but that alone cannot possibly justify extending RICO to foreign enterprises.

Moreover, the obvious enterprise focus of § 1962(a) and (b) further confirms that § 1962(c) is similarly focused. After all, those three provisions appear in a clear "three-part structure," *Reves*, 507 U.S. at 182-83, as Respondents themselves acknowledge, Resp.Br. 30-32. In addition, *Morrison*'s "focus" inquiry is simply an interpretive device for determining the geographic scope of federal statutes. *See* 561 U.S. at 255, 266. And it would contravene other basic interpretative canons to construe the defined term "enterprise" to mean "domestic enterprise" in some of its applications, but "domestic or foreign enterprise" in others. Pet.Br. 36-37.

4. Unlike Respondents, the Government concedes that the enterprise is a focus of § 1962. U.S. Br. 9. Yet the Government contends that the racketeering pattern is *another* such focus, and that if *it* is domestic then § 1962 applies. *Id.* 9, 21-22. In short, the Government argues that, if a statutory provision has multiple foci, then only one of them must be domestic.

The Government is mistaken. For one thing, as shown above, § 1962 is *not* focused on racketeering patterns. In any event, the rule established by *Morrison* is that statutory foci apply only domestically, absent a clear contrary indication; the rule is *not* that statutory foci apply extraterritorially, so long as some other significant domestic contact is also present. *See* 561 U.S. at 266. Thus, if the enterprise and the pattern were *both* foci of § 1962, then *each* of them would presumptively apply only domestically.

B. There Is No Clear Indication That RICO Extends To Foreign Enterprises, Or Even To Foreign Racketeering Patterns

Respondents do not dispute that neither RICO's substantive prohibitions nor its "enterprise" definition provides any indication, much less a clear one, that § 1962 reaches foreign enterprises. Pet.Br. 35-36. Instead, Respondents contend that RICO's incorporation of certain predicate offenses with extraterritorial scope clearly indicates that § 1962 extends to foreign enterprises, because otherwise those predicates would be meaningless surplusage. Resp.Br. 24-27. Respondents are wrong.

1. Whether or not RICO's incorporation of extraterritorial *predicates* is a clear indication that § 1962 covers foreign racketeering *patterns*, it in no way suggests that § 1962 prohibits the use of such patterns to corrupt foreign *enterprises*. Rather, it would be entirely consistent with RICO's text, and perfectly "meaningful" in light of its purposes, to prohibit the use of such patterns only insofar as they corrupt *domestic* enterprises. Pet.Br. 36-42.

Respondents do not seriously argue otherwise. Instead of arguing that there is a clear indication that RICO extends to foreign enterprises, they argue that the presumption against extraterritoriality does not apply to the enterprise at all, because RICO's "focus is the racketeering conduct" instead. Resp.Br. 30; *see also id.* 29 ("When the presumption against extraterritoriality has been 'answered' with respect to the statute's focus, ... no further limitations on the statute's territorial scope are warranted."). As we have shown, though, RICO's focus is not the racketeering pattern, but the corrupted enterprise.

The Government also makes a handful of policy arguments for why limiting RICO to domestic enterprises would be undesirable. U.S.Br. 22-26. But, as we have shown, these arguments are flawed on their own terms, *supra* Part II.A.3, and thus hardly sufficient to provide a *clear* indication that RICO extends to foreign enterprises.

2. Nor does RICO's incorporation of certain *predicates* with an extraterritorial scope even clearly indicate that § 1962 reaches foreign *patterns*. The fact that RICO incorporates the *substantive* scope of the predicates in no way indicates that it also incorporates their *geographic* scope. Rather, RICO could "meaningfully" cover these individual predicates only insofar as they are part of a pattern that, viewed as a whole, is properly deemed *domestic*. Pet.Br. 42-43. Indeed, that is particularly obvious for the money-laundering and material-support statutes at issue here: because they have *both* domestic and extraterritorial applications, they easily could have been incorporated into RICO solely for their domestic applications. *Id.* 4, 6, 43.

Respondents object that there is no textual basis for limiting § 1962 to domestic applications of these predicates. Resp.Br. 27-28; *see also* U.S.Br. 17. But the presumption against extraterritoriality *always* operates as an *implicit* territorial limitation. The whole point of the presumption is that "some things 'go without saying.'" *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014). That is why, for instance, this Court has interpreted the phrase "any civil action" as limited to *domestic* civil actions. *Kiobel*, 133 S. Ct. at 1665. And it is why the phrase "a pattern of racketeering activity" in § 1962 would be limited to

domestic patterns if the pattern element were a focus of RICO. Because such a limiting construction of the "generic" term is at least "possible," the presumption would require adopting it, particularly because the presumption also limits "the extent" of any extra-territoriality. Pet.Br. 19-20.

C. Respondents Do Not Validly Allege A Domestic Enterprise

To salvage a remand, Respondents try to recast their RICO claims as involving three domestic enterprises. But these arguments are irreconcilable with their own complaint and prior briefs.

First, Respondents conjure up claims under § 1962(a) and (b) based on certain Petitioners' acquisition of the Brown & Williamson Tobacco Company ("B&W"). Resp.Br. 20. But the acquisition of that domestic enterprise cannot support those putative claims. To begin, Respondents concede that Count 1 of their complaint, the sole claim under § 1962(a), does not even mention B&W. Resp.Br. 20. The same is true for Count 2 of their complaint, the sole claim under § 1962(b). Pet.App. 253a-255a. And contrary to Respondents' suggestion, the allegations about B&W elsewhere in the complaint cannot be plausibly construed as raising claims challenging the acquisition under § 1962(a) or (b). Instead, the allegations focus entirely on the purported role of B&W in the § 1962(c) claim challenging the conduct of the "RJR Money-Laundering Enterprise." Pet.App. 188a-200a. Indeed, the allegations do not even state that Petitioners *used* racketeering proceeds or a racketeering pattern *to invest in or acquire* B&W, as required under § 1962(a) and § 1962(b), respectively. *Id.* Moreover, Respondents

do not and cannot justify their failure to allege *any injuries* that were proximately caused *by the investment or acquisition itself*, rather than by any ensuing racketeering activity. Pet.Br. 58-59; *see also Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir. 1996).

Second, Respondents attack the district court's conclusion that the alleged "RJR Money-Laundering Enterprise" is a foreign enterprise under the so-called "nerve center" test. Resp.Br. 21; *see also* U.S.Br. 28-29. But this argument also fails. For starters, it is waived. Contrary to Respondents' suggestion (Br. 21 n.8), the petition for certiorari expressly asserted that a domestic-enterprise rule would exclude the "RJR Money-Laundering Enterprise," given the district court's unquestioned holding that this alleged enterprise is foreign. Pet. 29-30. Yet the opposition brief did not dispute that assertion, BIO 12, and thus waived the issue, Pet.Br. 57. In any event, the alleged "RJR Money-Laundering Enterprise" is indisputably foreign. Regardless of the precise legal test applied to determine the location of a RICO enterprise, an enterprise must be characterized as foreign where, as here, it allegedly consists of foreign criminals laundering their foreign criminal proceeds by purchasing fungible goods sold by a domestic cigarette manufacturer. Pet.Br. 57. And that is especially so where, as here, the plaintiffs have made similar allegations against all other large international cigarette manufacturers, Resp.Br. 6-8; Pet.Br. 7 n.2—thus leaving no doubt that the foreign criminals are the common masterminds directing the alleged schemes.

Third, Respondents briefly suggest that their § 1962(c) claim can be limited to a domestic "association-in-fact" enterprise consisting of "the group of American RJR entities." Resp.Br. 22. But this novel suggestion is baseless. It too was waived at the cert-stage, BIO 12, and is entirely unsupported in the complaint, the belatedly-invoked provisions of which merely contain boilerplate allegations that a corporation is liable for the acts of its agents, Pet. App. 184a-185a. Nor could the conduct of such a gerrymandered domestic enterprise be a proximate cause of Respondents' alleged injuries, *see* Pet.Br. 5-6, which would flow from the "distinct" and "remote" acts of the foreign criminals excluded from the enterprise, *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 456-58 (2006).

CONCLUSION

The judgment below should be reversed and the RICO claims dismissed. At a minimum, the judgment should be vacated and the RICO claims remanded for further consideration.

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No. 15-138

In the Supreme Court of the United States

RJR NABISCO, INC., ET AL., PETITIONERS

v.

THE EUROPEAN COMMUNITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

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QUESTION PRESENTED

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, makes it unlawful to invest in an enterprise any income derived from a pattern of racketeering activity, to acquire control of an enterprise through a pattern of racketeering activity, to conduct an enterprise's affairs through a pattern of racketeering activity, or to conspire to do any of those things. 18 U.S.C. 1962. RICO defines "racketeering activity" to include acts in violation of certain criminal provisions that expressly proscribe conduct outside of the United States. 18 U.S.C. 1961(1).

The question presented is whether, or to what extent, RICO applies extraterritorially.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

INTEREST OF THE UNITED STATES

The Department of Justice is responsible for criminal and civil enforcement of the Racketeer Influenced and Corrupt Organizations Act (RICO), Pub. L. No. 91-452, Tit. IX, 84 Stat. 941. See 18 U.S.C. 1963, 1964(a)-(b). Accordingly, the United States has a substantial interest in resolution of the question presented.

STATEMENT

1. a. In 1970, Congress enacted RICO, 18 U.S.C. 1961 *et seq.*, to combat racketeering. Section 1962 of Title 18 sets forth the conduct that RICO makes "unlawful." Under that provision, a person acts unlawfully by investing any income derived from "a pattern of racketeering activity" in an "enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce," 18 U.S.C. 1962(a); by acquiring or maintaining control of such an enterprise through "a

pattern of racketeering activity," 18 U.S.C. 1962(b); by "conduct[ing] or participat[ing] * * * in the conduct of" such an enterprise's "affairs" through "a pattern of racketeering activity," 18 U.S.C. 1962(c); or by conspiring to do any of those things, 18 U.S.C. 1962(d).

The statute defines "racketeering activity" as an "act or threat" involving specified federal offenses or state-law crimes. 18 U.S.C. 1961(1). A "pattern" of such activity "requires at least two" such acts that are related and continuous. 18 U.S.C. 1961(5); see *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-243 (1989). The statute defines "enterprise" to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4).

RICO sets forth both criminal sanctions and civil remedies. A person convicted of violating Section 1962 is subject to imprisonment, a fine, and forfeiture. 18 U.S.C. 1963(a)(1). The Attorney General also may institute civil proceedings to "prevent and restrain" Section 1962 violations. 18 U.S.C. 1964(a)-(b), 1966. And a private party "injured in his business or property by reason of a violation of [S]ection 1962" may bring a civil suit to recover treble damages and attorneys' fees. 18 U.S.C. 1964(c).

b. RICO's definition of "racketeering activity" encompasses a variety of federal offenses with extraterritorial application. See App. B, *infra* (non-exhaustive list). The original 1970 definition included any federal offense punishable by more than one year "involving * * * buying, selling, or otherwise dealing in narcotic or other dangerous drugs." 18 U.S.C. 1961(1)(D)

(1970); see 18 U.S.C. 1961(1)(D) (Supp. II 2014). Twelve days after enactment of that definition, a new federal law made it a felony for any person to manufacture or distribute certain controlled substances while intending or knowing that the substances will be unlawfully imported into this country—a proscription that expressly "reach[es] acts of manufacture or distribution committed outside the territorial jurisdiction of the United States." Pub. L. No. 91-513, Tit. III, § 1009, 84 Stat. 1289 (codified as amended at 21 U.S.C. 959). Subsequent amendments extended other federal crimes included in "racketeering activity" to reach extraterritorial conduct. See, *e.g.*, Pub. L. No. 103-322, Tit. XVI, § 160001(g), 108 Stat. 2037 (1994 amendment of 18 U.S.C. 2423, a provision listed in Section 1961(1)(B) beginning in 1970).

Congress also has expanded the definition of "racketeering activity" by incorporating additional federal criminal provisions into Section 1961 that apply extraterritorially (and did so at the time Congress added them to RICO). For example, in 1986, Congress enacted a new money laundering offense providing for extraterritorial jurisdiction if a prohibited transaction involves funds exceeding $10,000 and the unlawful conduct is committed by a U.S. person. Pub. L. No. 99-570, Tit. I, Subtit. H, § 1352(a), 100 Stat. 3207-18 to 3207-20 (codified as amended at 18 U.S.C. 1956(f)). In the same statute, Congress amended Section 1961 to designate as "racketeering activity" any "act which is indictable" under that new provision. § 1365(b), 100 Stat. 3207-35 (amending 18 U.S.C. 1961(1)(B)).

After the terrorist attacks of September 11, 2001, Congress amended RICO to include as predicate acts

numerous offenses related to "[a]cts of terrorism transcending national boundaries." 18 U.S.C. 2332b; see USA PATRIOT Act, Pub. L. No. 107-56, Tit. VIII, § 813, 115 Stat. 382 (adding to RICO's "racketeering activity" definition any act "indictable under any provision listed in [S]ection 2332b(g)(5)(B)"); 18 U.S.C. 2332b(g)(5)(B) (listing offenses that may be "Federal crime[s] of terrorism"). Many of those offenses apply extraterritorially, and some impose criminal liability for conduct that can occur only outside the United States. 18 U.S.C. 2332b(g)(5)(B) (listing, *inter alia*, 18 U.S.C. 1203, which criminalizes certain hostage taking "whether inside or outside the United States," and 18 U.S.C. 2332, which criminalizes killing a U.S. national "while such national is outside the United States").

2. a. Respondents are the European Community and 26 of its member states. Petitioners are RJR Nabisco and related corporate entities. Pet. App. 1a-2a. Respondents brought a civil RICO action against petitioners in the Eastern District of New York. *Ibid.*[1]

Respondents' second amended complaint alleges that petitioners "directed" and "controlled" a money-laundering scheme involving "sell[ing] cigarettes to and through criminal organizations" in Europe and "accept[ing] criminal proceeds in payment for cigarettes by secret and surreptitious means." Pet. App. 134a-135a. According to the complaint, petitioners were part of an association-in-fact enterprise and engaged in a pattern of racketeering involving the predicate RICO acts of money laundering, provision of

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[1] In 2009, after the action began, the European Community merged with the European Union. See Consolidated Version of the Treaty on European Union, Art. I, 2010 O.J. C83/16.

material support to foreign terrorist organizations, wire fraud, mail fraud, and violation of the Travel Act. *Id.* at 237a-253a. The complaint alleges that petitioners' conduct was unlawful under each subsection of 18 U.S.C. 1962 and resulted in injury to respondents' business or property. Pet. App. 209a, 237a-260a.

In describing respondents' claimed injury, the complaint alleges many harms that are extraterritorial—and, in some instances, purely sovereign. *E.g.*, Pet. App. 216a-229a (alleging harm to foreign state-owned banks, devaluation of Euro, increased law-enforcement costs, and lost customs, duties, and taxes). The complaint also alleges that respondents directly compete with petitioners "in the market for [sales of] cigarettes" and that petitioners' RICO violations have caused respondents to lose sales in markets "including" the United States. *Id.* at 210a-213a.

b. Petitioners moved to dismiss, arguing that respondents failed to state RICO claims because RICO does not apply extraterritorially to the acts alleged. Pet. App. 40a. While that motion was pending, this Court held in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), that, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 255. The court of appeals subsequently applied *Morrison* in *Norex Petroleum Ltd.* v. *Access Industries, Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam), cert. denied, 133 S. Ct. 21 (2011), which affirmed dismissal of a private RICO complaint involving "foreign actors and foreign acts." *Id.* at 31.

The district court granted petitioners' motion to dismiss. Pet. App. 44a; see *id.* at 52a. The court understood *Norex* as "prohibit[ing] any extraterritorial application of RICO." *Id.* at 45a. The court also un-

derstood respondents' claims as seeking such extraterritorial application. *Id.* at 46a-52a (stating that focus of RICO is the "enterprise" and applying nerve-center test akin to one adopted in *Hertz Corp.* v. *Friend*, 559 U.S. 77 (2010), to conclude that complaint alleged foreign enterprise).

3. a. The court of appeals reversed. Pet. App. 1a-36a. The court observed that RICO "incorporates by reference various federal criminal statutes," some of which "unambiguously and necessarily involve extraterritorial conduct" and others of which apply extraterritorially in specified circumstances. *Id.* at 9a-11a. The court explained that, "[b]y incorporating these statutes into RICO as predicate racketeering acts, Congress has clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for RICO liability." *Id.* at 11a.

The court of appeals rejected any requirement that a defendant be "associated with a domestic enterprise in order to sustain RICO liability." Pet. App. 14a. The court stated that "the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States." *Ibid.* The court also explained that "[a]n interpretation of RICO that depends on the location of the enterprise would undermine" the "value" of "predictability." *Id.* at 15a.

Examining respondents' complaint, the court of appeals determined that the RICO claims based on the predicate offenses of money laundering and provision of material support "meet the statutory requirements for extraterritorial application of RICO," be-

cause both of those offenses expressly encompass conduct by a U.S. citizen that occurs outside the United States. Pet. App. 16a-18a; see 18 U.S.C. 1956(f), 1957(d)(2), 2339B(d)(1)(A). The court reached the opposite conclusion with respect to the RICO claims based on the predicate offenses of mail fraud, wire fraud, and violation of the Travel Act—but it nevertheless permitted those claims to proceed, finding that the complaint alleges "domestic conduct" as to those three predicates. Pet. App. 18a-21a, 23a.

b. Petitioners sought panel rehearing, and the panel issued a separate per curiam opinion denying that request. Pet. App. 55a-58a. That opinion rejected the proposition that a private party asserting a claim under 18 U.S.C. 1964(c) must allege a domestic injury. Pet. App. 55a-56a. In the court of appeals' view, because the "injury requirement focuses on RICO's predicates," no basis exists for "import[ing] a domestic injury requirement" not found in a relevant predicate "simply because the victim sought redress through the RICO statute." *Id.* at 56a-58a.

c. Petitioners also sought en banc rehearing. The court of appeals denied the petition, with five judges dissenting. Pet. App. 59a-60a; see *id.* at 60a-68a (concurrence in denial by Judge Hall). Four dissenting judges wrote opinions. Pet. App. 68a-69a (Jacobs, J.); *id.* at 69a-74a (Cabranes, J.); *id.* at 74a-97a (Raggi, J.); *id.* at 97a-104a (Lynch, J.).

Judge Lynch dissented from the denial because he agreed that the case warranted en banc resolution, Pet. App. 97a—but he endorsed the panel's determination that a plaintiff states a RICO claim if "the foreign portion of the pattern [of racketeering activity] involved conduct that Congress has expressly

chosen to reach via the extraterritorial application of American law," *id.* at 99a. Discussing a hypothetical indictment of the leader of a foreign terrorist group that bombed a site in the United States and murdered an American journalist abroad, Judge Lynch explained that "whether Congress intended to reach such conduct by the RICO statute" is an "easy question," since the murder is a predicate RICO offense under a provision with extraterritorial application incorporated into RICO's definition of "racketeering activity." *Id.* at 98a-99a. He added that this conclusion would not "change if all of the predicate crimes alleged were committed abroad," so long as "Congress expressly extended its criminal prohibitions to the foreign conduct in question and incorporated those prohibitions into RICO." *Id.* at 101a (emphasis omitted). Judge Lynch expressed the hope that "the context of this case" would not "blind" this Court "to the clear intention of Congress to apply RICO to foreign terrorist groups who commit patterns of criminal acts that may occur abroad, but that violate American laws with express extraterritorial reach." *Id.* at 104a.

SUMMARY OF ARGUMENT

A. Congress "clearly expressed" its intention to give 18 U.S.C. 1962 limited extraterritorial reach. *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (citation omitted) (discussing presumption against extraterritoriality). Congress incorporated into RICO's definition of "racketeering activity" multiple predicate crimes that unambiguously proscribe extraterritorial conduct. Indeed, some predicate crimes apply only extraterritorially. That incorporation would have been meaningless if RICO had no extraterritorial application at all. Thus, when proof of

unlawful conduct under Section 1962 depends on predicate crimes that themselves apply extraterritorially, Section 1962 applies extraterritorially as well.

B. Contrary to petitioners' claim, RICO contains no domestic-enterprise requirement. RICO's "focus" (*Morrison*, 561 U.S. at 266) is on the "pattern" as well as the enterprise. Accordingly, if a pattern of domestic racketeering activity occurs, RICO may be violated whether the enterprise is foreign or domestic.

The same is true for a pattern of racketeering activity that occurs overseas and that is encompassed by predicate offenses covering the extraterritorial conduct. When extraterritorial racketeering is covered by RICO, a clear congressional intent exists to cover a foreign enterprise: a foreign enterprise may be the vehicle for carrying out the criminal acts or the repository of any resulting profits. And because Section 1962 covers the enterprise only if it "is engaged in" or conducts "activities" that "affect[] interstate or foreign commerce," 18 U.S.C. 1962(a)-(c), no RICO case will extend to an enterprise without ties to the United States.

Petitioners' domestic-enterprise requirement would needlessly hamper the United States in prosecuting RICO cases involving foreign terrorist enterprises or other foreign criminal operations. It would also reward criminals for structuring their activities to involve foreign entities rather than domestic ones. Applying the presumption against extraterritoriality to produce those harmful effects would defeat Congress's expressed application of RICO's powerful remedies to extraterritorial crimes.

C. Petitioners are correct, however, that the private treble-damages remedy in 18 U.S.C. 1964(c)—a

narrower provision than Section 1962—requires proof of a domestic injury. Section 1964(c) requires an injury to the private plaintiff's "business or property," 18 U.S.C. 1964(c), that is proximately caused by violation of Section 1962. The principles underlying the presumption against extraterritoriality apply in deciding whether such an injury must be domestic—including the key principle of avoiding "unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted).

When the United States brings a RICO suit, it can take steps to minimize such "clashes" and "discord." But a private RICO suit seeking treble damages for a foreign injury has significant potential to cause international friction. Accordingly, the bar for showing a clear congressional intent to allow private RICO actions on the basis of a foreign injury is high—and Section 1964(c) gives no indication that Congress intended foreign injury to support a private RICO claim. Dismissal is therefore required absent a showing of domestic injury. This case should be remanded to permit the lower courts to evaluate the complaint in light of that requirement.

ARGUMENT

A. Section 1962 Applies Extraterritorially To The Extent That Charged Predicate Offenses Apply Extraterritorially

1. Congress has "authority to enforce its laws beyond the territorial boundaries of the United States." *Equal Emp't Opportunity Comm'n* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*); see, *e.g.*, *Foley Bros., Inc.* v. *Filardo*, 336 U.S. 281, 284 (1949).

Because "Congress ordinarily legislates with respect to domestic, not foreign matters," however, this Court "presume[s]" when construing a statute that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison*, 561 U.S. at 255 (citations omitted). That presumption affords "a stable background against which Congress can legislate with predictable effects," *id.* at 261, and "protect[s] against unintended clashes between our laws and those of other nations which could result in international discord," *Kiobel*, 133 S. Ct. at 1664 (quoting *Aramco*, 499 U.S. at 248); see *Morrison*, 561 U.S. at 255.

To overcome the presumption against extraterritoriality, a statute must evince "the affirmative intention of the Congress, clearly expressed." *Morrison*, 561 U.S. at 255 (citation omitted). No particular language is required, and "context can be consulted as well" as text. *Id.* at 265; see *Kiobel*, 133 S. Ct. at 1665-1666; *Foley Bros.*, 336 U.S. at 285-291. But a statute must give a "clear indication of an extraterritorial application"—otherwise, "it has none." *Morrison*, 561 U.S. at 255.[2] Moreover, that one provision of a statute "pro-

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[2] In *United States* v. *Bowman*, 260 U.S. 94 (1922), this Court held that the presumption against extraterritoriality is inapplicable to criminal statutes that are "not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself"—as, for instance, where the government's own agents commit a "fraud" against it. *Id.* at 98; see, *e.g.*, *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948) (describing *Bowman* rule "as to crimes directly affecting the Government"). In light of *Morrison* and *Bond* v. *United States*, 134 S. Ct. 2077, 2088 (2014), the United States understands *Bowman* to stand for the principle that a statute enacted to defend

vides for some extraterritorial application" does not indicate that every other part of the statute applies in the same fashion; rather, the presumption "operates to limit that provision to its terms." *Id.* at 265; see *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437, 456 (2007).

When a statute does not apply extraterritorially, a party must allege domestic conduct that is within "the 'focus' of congressional concern." *Morrison*, 561 U.S. at 266 (citation omitted). If the alleged domestic conduct involves the acts that "the statute seeks to 'regulate,'" and if the parties who are allegedly injured are among those "that the statute seeks to 'protec[t],'" then the claim qualifies as a domestic application, even if the case also involves some amount of foreign activity. *Id.* at 267 (citation omitted); see *id.* at 250-251, 266-267.

2. By incorporating into 18 U.S.C. 1962 predicate criminal offenses that unambiguously proscribe extraterritorial conduct, Congress has clearly indicated that it intends RICO to have limited extraterritorial application.

a. Section 1962 makes it "unlawful for any person" to make an "enterprise" the prize, victim, or vehicle of "a pattern of racketeering activity." 18 U.S.C. 1962(a)-(c); see G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett *v.* Berg, 58 Notre Dame L. Rev. 237, 307-309 (1982). RICO defines "racketeering activity"—the "key term" in Section 1962, *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639, 652 (2008)—as "any act which is

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the government contains the requisite indication of extraterritorial application. The allegations in this case do not implicate any such statute.

indictable under" enumerated federal criminal provisions or "any act or threat" involving certain state-law crimes, 18 U.S.C. 1961(1)(A)-(G). Some of the federal criminal provisions encompassed by that definition cover only extraterritorial conduct. For example, RICO includes as a predicate "any act that is indictable under any provision listed in [S]ection 2332b(g)(5)(B)." 18 U.S.C. 1961(1)(G); see 18 U.S.C. 2332b(g)(5)(B). Killing a U.S. national "while such national is outside the United States," in violation of 18 U.S.C. 2332(a), is such an indictable offense. *Ibid.*; see 18 U.S.C. 2332(b). So, too, is use by a U.S. national of "a weapon of mass destruction outside of the United States." 18 U.S.C. 2332a(b).

Other federal criminal provisions incorporated into the definition of "racketeering activity" have extraterritorial application under specified circumstances. Pet. App. 10a-11a. The predicate RICO crime described in 18 U.S.C. 1203, for instance, is the taking of hostages "inside or outside the United States" to compel a "third person or a governmental organization" to act or refrain from acting. 18 U.S.C. 1203(a); see 18 U.S.C. 1961(1)(G). But extraterritorial hostage taking "is not an offense" under Section 1203—and therefore not a form of "racketeering activity"—unless "the offender or the person seized or detained is a national of the United States," "the offender is found in the United States," or "the governmental organization sought to be compelled is" the United States. 18 U.S.C. 1203(b)(1)(A)-(C); see, *e.g.*, 18 U.S.C. 2332g(a)-(b) (proscribing certain conduct involving missile systems designed to destroy aircraft and specifying jurisdiction over "offense occur[ing] outside of the United States" committed by a U.S. national, against

a U.S. national abroad, or against U.S. property abroad); 18 U.S.C. 1961(1)(G).[3]

b. By incorporating offenses with extraterritorial application as predicate acts under RICO, Congress clearly and affirmatively manifested its intent that Section 1962 "apply to extraterritorial conduct to the extent that extraterritorial violations of those statutes serve as the basis for" establishing liability. Pet. App. 11a. As Judge Lynch observed, "Congress's enactment of a law specifically designed to protect Americans abroad" or otherwise to extend outside the United States, and the "express incorporation of that law into RICO as a predicate crime," cannot be understood to "constitute anything other than a clear expression of congressional intent to apply RICO to persons who commit that crime, in furtherance of the affairs of an enterprise, as part of a pattern of racketeering." Pet. App. 100a (Lynch, J., dissenting).[4]

Interpreting Section 1962 to have extraterritorial reach coextensive with that of the RICO predicates gives the provision a confined, consistent, and predictable application that depends on careful parameters that Congress has established, and not on speculation about "what Congress would have wanted." *Morrison*, 561 U.S. at 261. Thus, a person commits an of-

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[3] To the extent that predicate offenses incorporated into RICO apply extraterritorially, that application is often limited to conduct that is committed by or against a U.S. national or that affects U.S. property or some other U.S. interest. See App. B, *infra*.

[4] Lower courts have consistently analyzed the extraterritoriality of other criminal statutes that involve commission of some underlying offense (such as 18 U.S.C. 2 and 924(c)) in just that way. See, *e.g.*, *United States* v. *Ballestas*, 795 F.3d 138, 144-145 (D.C. Cir. 2015).

fense under RICO if he participates in the conduct of an enterprise's affairs through a pattern of murdering U.S. nationals traveling abroad in violation of Section 2332(a). See 18 U.S.C 1961(1)(G), 1962(c). Likewise, a person commits an offense under RICO if he takes a group of U.S. nationals hostage in a foreign country in violation of Section 1203, so long as that conduct is part of a pattern of racketeering activity that has the requisite connection to an enterprise. See 18 U.S.C 1961(1)(G), 1962(a)-(c). In contrast, "[a] pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy cannot violate RICO," because no RICO predicate with extraterritorial reach applies to those bad acts. Pet. App. 101a (Lynch, J., dissenting). Similarly, hostage taking in a foreign country cannot give rise to RICO liability if neither the offender nor the victim is a U.S. national, the offender is not found in the United States, and the conduct does not aim to compel the U.S. government, because in those circumstances liability for extraterritorial conduct could not arise under the predicate hostage-taking statute. And such purely foreign murder or hostage taking remains outside RICO's scope even if a different predicate offense with extraterritorial application is alleged in the same case. See *Morrison*, 561 U.S. at 265 ("[W]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms.").

A narrower reading of Section 1962 would render entirely superfluous the inclusion in Section 1961's definition of "racketeering activity" of predicate acts that cannot be committed inside the United States. If RICO has no application to extraterritorial conduct,

then Congress would have had no reason to identify acts such as killing a U.S. national abroad or use of a weapon of mass destruction by a U.S. national abroad as "racketeering activity" that can form an unlawful pattern under Section 1962. See Pet. App. 10a. Deeming the portions of Section 1961 that list such acts to be mere surplusage would violate the "'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute.'" *Loughrin* v. *United States*, 134 S. Ct. 2384, 2390 (2014) (quoting *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000)); cf. *Morrison*, 561 U.S. at 264-265.

Refusing to give full effect to predicate offenses that have specified (but not exclusive) extraterritorial application would similarly contradict Congress's clearly expressed intention. If a predicate offense is listed in Section 1961 and covers both domestic conduct and particular foreign conduct, but could not form the basis for a RICO violation unless domestic conduct was alleged, then offenders who fall within the scope of the plain language of Section 1962 would nevertheless be permitted to escape RICO liability—a result that the Congress that selected such a predicate "in the first place" would find "astonish[ing]." Pet. App. 104a (Lynch, J., dissenting); see, *e.g.*, Stephen C. Warneck, Note, *A Preemptive Strike: Using RICO and the AEDPA to Attack the Financial Strength of International Terrorist Organizations*, 78 B.U. L. Rev. 177, 200 (1998).

3. In this case, the court of appeals correctly recognized that when an alleged violation of Section 1962 "depends on violations of a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially," Section 1962 "will apply to

extraterritorial conduct, too, but only to the extent that the predicate would." Pet. App. 9a. None of the arguments advanced by the dissenters from denial of en banc rehearing undermines that analysis.

First, dissenters hypothesized (Pet. App. 85a (Raggi, J., dissenting)) that Congress might have included offenses with extraterritorial application as RICO predicates to allow the government to prove that "an essentially domestic pattern of racketeering" is sufficiently related and continuous. That speculation, to which petitioners briefly advert (Br. 42-43), lacks merit. To constitute a RICO "pattern," predicate acts must be "related" and "amount to or pose a threat of continued criminal activity." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). If extraterritorial acts are necessary to that showing, then the statute necessarily applies extraterritorially to that extent. And since RICO permits the showing of a pattern with any two predicate offenses, 18 U.S.C. 1961(5), extraterritorial predicate offenses can form a pattern even in the absence of any allegation about domestic predicate crimes. The presumption against extraterritoriality is not a license to rewrite RICO to make liability depend on a pattern consisting of only a subset of the predicate offenses that Congress selected. See, *e.g.*, *Salinas* v. *United States*, 522 U.S. 52, 59 (1997); Pet. App. 101a (Lynch, J., dissenting).[5]

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[5] Legislative history dating from RICO's 1970 enactment does indicate that Congress wanted to attack "organized crime in the United States." *Beck* v. *Prupis*, 529 U.S. 494, 496 (2000) (quoting 84 Stat. 923). But this Court has rejected the notion that the statute is limited to effectuating that precise goal, see, *e.g.*, *Na-*

Second, dissenters suggested (Pet. App. 86a (Raggi, J., dissenting)) that giving RICO extraterritorial effect is not necessary because the government can prosecute a defendant whose extraterritorial conduct violates one of the predicate statutes for a violation of that statute alone. Petitioners (Br. 39) make a similar suggestion. That approach discounts entirely the importance of RICO as a law enforcement tool for combating racketeers and "assault[ing]" their "economic roots." *Russello* v. *United States*, 464 U.S. 16, 26 (1983). Congress enacted RICO, and listed certain offenses as predicates, because it wanted to "supplement old remedies and develop new methods for fighting crime." *Sedima S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 498 (1985). For instance, RICO allows joint criminal trials of those engaged in the same enterprise, see, *e.g.*, Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 663, 740 (1987); "strengthen[s] the legal tools" available to the government, *Beck* v. *Prupis*, 529 U.S. 494, 496 (2000); and provides "severe criminal penalties" (including a maximum term of imprisonment exceeding the maximum authorized for some predicate offenses that apply extraterritorially), *ibid.*; see *Russello*, 464 U.S. at 27-28; compare, *e.g.*, 18 U.S.C. 1963(a) with 18 U.S.C. 1029, 1957. If RICO's scope were circumscribed on the assumption that prosecution of the predicate offenses themselves is sufficient, then the government's efforts to fight serious transnational crime, including terrorism, would be hampered.

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tional Org. for Women, Inc. v. *Scheidler*, 510 U.S. 249, 260 (1994) (citing *H.J.*, 492 U.S. at 248), and Congress added predicate offenses with extraterritorial application to RICO's definition of racketeering activity subsequent to 1970, see pp. 3-4, *supra*.

See Pet. App. 98a-101a, 104a (Lynch, J., dissenting); *id.* at 61a (Hall, J., concurring) ("[m]any of the predicates that apply to foreign conduct relate to international terrorism"); see also, *e.g.*, Nat'l Sec. Staff, *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security* 3, 5-8 (2011) ("[I]nternational—or transnational—organized crime has expanded dramatically in size, scope, and influence and * * * poses a significant threat to national and international security."); Gideon Mark, *RICO's Extraterritoriality*, 50 Am. Bus. L.J. 543, 545, 577-585 (2013).

4. The court of appeals also analyzed the predicate crimes on which respondents' RICO claims are based. See Pet. App. 238a-250a. As to money laundering and provision of material support to foreign terrorist organizations, the court correctly determined that extraterritorial conduct indictable under the relevant federal criminal provisions can give rise to RICO liability. See *id.* at 17a-18a; 18 U.S.C. 1961(1)(B), (G). The money laundering statutes impose criminal liability for proscribed conduct outside the United States involving funds in excess of $10,000 in value if the conduct is undertaken by a U.S. citizen. See 18 U.S.C. 1956(f), 1957(d). And the material support statute provides for "extraterritorial Federal jurisdiction" over the offense of knowingly providing material support to a foreign terrorist group. 18 U.S.C. 2339B(d)(1)-(2).

As to mail fraud, wire fraud, and violation of the Travel Act, the court of appeals held that those predicates do not apply extraterritorially but that the complaint "alleges sufficient domestic conduct for the claims involving * * * [those] violations to sustain

the application of RICO." Pet. App. 20a-21a; see *id.* at 23a (complaint "clearly states a domestic cause of action" even if "further conduct contributing to the violation occurred outside" this country). Given the court's ruling on the sufficiency of the allegations of domestic conduct with respect to those predicates, this case presents no occasion to separately analyze their extraterritorial scope. See *id.* at 19a.[6]

B. Section 1962 Covers Foreign Enterprises As Well As Domestic Ones

Petitioners contend that, regardless of whether Section 1962 applies extraterritorially to racketeering activity outside the United States in certain circumstances, the provision has no application to foreign enterprises. In their view (Br. 24-38), the "focus" of RICO is on the infiltration, acquisition, or use of an "enterprise," and Congress's sole concern was with domestic enterprises. Petitioners thus ask this Court to create a rule under which "members of a Mexican drug cartel, the Sicilian Mafia, or a foreign-based terrorist organization" would be immune from RICO prosecution despite "commit[ting] a series of violent crimes on U.S. soil that would clearly violate RICO if

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[6] Whatever the merit of the court of appeals' holding on the non-extraterritoriality of mail and wire fraud, it correctly concluded (Pet. App. 20a-23a) that a prosecution involving a foreign defendant's use of domestic mailings or wires in furtherance of a scheme to defraud—including wire communications sent from or into the United States—constitutes a permissible domestic application of those statutes. As for the Travel Act, the court's analysis is flawed; that statute criminalizes the very act of traveling to a foreign country with requisite criminal intent, so long as the defendant "thereafter" undertakes a prohibited activity. 18 U.S.C. 1952(a).

committed by a local drug distribution gang, a New York-based Mafia family, or the Weather Underground." Pet. App. 100a (Lynch, J., dissenting). As the court of appeals correctly concluded, the presumption against extraterritorial application of U.S. statutes does not require that interpretation of RICO. Pet. App. 14a; see *United States* v. *Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013) (reaching same conclusion).

1. a. When a pattern of racketeering activity is carried out by a foreign enterprise within the territorial boundaries of the United States, applying Section 1962 to a defendant with the requisite connection to that enterprise does not entail an extraterritorial application of RICO. See 18 U.S.C. 1962(c); cf. Pet. App. 99a-101a (Lynch, J., dissenting). Similarly, Section 1962 is not applied extraterritorially when deployed against a defendant who has engaged in a domestic pattern of racketeering activity and then leverages that activity into creation of, investment in, or control over a foreign enterprise. See 18 U.S.C. 1962(a)-(b).

Contrary to petitioners' view, a pattern of racketeering activity is a focus of Section 1962's concern. As this Court has stated, "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987); see *H.J.*, 492 U.S. at 236. That pattern constitutes the primary conduct that RICO seeks to prevent, because a pattern of related criminal acts carried out in a concerted way, with a continuous criminal purpose underlying them, is more pernicious than scattered and isolated criminal acts. Moreover, a pattern of such acts, all of which are necessarily serious crimes, leaves an especially broad

trail of victims in its wake. A racketeering pattern is therefore one of the "objects of the statute's solicitude"—something that RICO seeks to "regulate," *Morrison*, 561 U.S. at 267, by means of the expanded powers and remedies that statute authorizes.

Accordingly, if the conduct constituting the racketeering happens within the United States, a RICO action based on those acts is a domestic application of the statute, see *Morrison*, 561 U.S. at 266-267, no matter who is acting or where the proceeds ultimately may be sent, cf. *Pasquantino* v. *United States*, 544 U.S. 349, 371-372 (2005). After all, the presumption against extraterritoriality reflects Congress's "primar[y] concern[] with domestic conditions," *Morrison*, 561 U.S. at 255 (quoting *Aramco*, 499 U.S. at 248)—but petitioners' proposed requirement of a domestic enterprise would exclude foreign organizations directly responsible for carrying out domestic criminal acts. See 18 U.S.C. 1962(c); *Chevron Corp.* v. *Donziger*, 871 F. Supp. 2d 229, 242-243 (S.D.N.Y. 2012).[7]

Imposing a domestic-enterprise requirement in cases involving domestic racketeering activity would hamstring the government's ability to prosecute transnational RICO cases. It would block the indictment under RICO of a person participating in the conduct of a foreign terrorist organization that sends operatives across the U.S. border to carry out domestic attacks. See Pet. App. 100a (Lynch, J., dissent-

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[7] When Congress decided shortly after 9/11 to add to RICO numerous predicate offenses related to terrorist activity, see Pet. App. 61a (Hall, J., concurring), it acted with just such a foreign terrorist enterprise in mind. See *Kiobel*, 133 S. Ct. at 1666 (consulting "historical background" of statute).

ing).[8] It would allow a person who profited from domestic racketeering activity to avoid criminal RICO liability by pouring those profits into a foreign enterprise that may become a source of economic power, or even a vehicle, for additional criminal acts in the United States. See, *e.g.*, *United States* v. *Parness*, 503 F.2d 430, 438-439 (2d Cir. 1974) (refusing to permit "those whose actions ravage the American economy" to "escape [RICO] prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise"), cert. denied, 419 U.S. 1105 (1975). And it would encourage criminals to structure their activities in exactly those sorts of liability-evading ways. See Melvin L. Otey, *Why RICO's Extraterritorial Reach Is Properly Coextensive with the Reach of Its Predicates*, 14 J. Int'l Bus. & L. 33, 63-64 (2015) (Otey). Bad actors should not be permitted to "evade the thrust" of U.S. law by "so simple a device" as involving a foreign rather than a domestic enterprise, *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 287 (1952)—particularly when the threat of transnational crime is so acute and RICO provides such important tools for combating it. See, *e.g.*, Otey 46-48, 54-55; pp. 18-19, *supra*.

b. A domestic-enterprise requirement would be equally misplaced when racketeering activity occurs

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[8] Petitioners contend (Pet. 40) that in such a case prosecutors could charge a "distinct domestic enterprise" consisting of the operatives themselves. But it is difficult to understand how, for instance, a foreign national attached to a foreign organization and sent into the country briefly to commit a crime and then depart again could be considered a "domestic enterprise" or how he would be "distinct" from any domestic enterprise, as Section 1962(c) requires. *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001); see pp. 28-29, *infra* (discussing associations-in-fact).

outside the United States, but is encompassed by Section 1961 because a relevant predicate offense covers the extraterritorial conduct. In analyzing Congress's intent with respect to extraterritorial application, the "enterprise" under Section 1962 cannot be considered in isolation. Contrary to petitioners' view (Br. 25-34), Section 1962 "focuses" not merely on effects on an enterprise; it targets specific *interactions* of a pattern of racketeering activity and the enterprise. The racketeering activity must be used to acquire, infiltrate, establish, operate, or otherwise subvert the enterprise. See 18 U.S.C. 1962(a)-(c). In no case does a violation exist without both elements. *Boyle* v. *United States*, 556 U.S. 938, 946-947 (2009).

The linkage between the enterprise and the pattern may be particularly tight for illegal enterprises. There, the enterprise's significance may be solely as the vehicle for conducting specific patterns of crimes. 18 U.S.C. 1962(c); see *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 259 (1994) ("the 'enterprise' in [S]ubsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed"). In such instances, "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Boyle*, 556 U.S. at 947 (quoting *United States* v. *Turkette*, 452 U.S. 576, 583 (1981)). It would make little sense in such cases to allow evidence of extraterritorial crimes to establish the "pattern," but not the "enterprise."

Thus, Congress's deliberate extension of Section 1962 to cover a pattern of racketeering activity consisting of certain extraterritorial acts provides critical "context," *Morrison*, 561 U.S. at 265, for assessing the

enterprise requirement. It does not require "guess-[work]," *id.* at 261, to conclude that when Congress authorized RICO prosecutions based on extraterritorial predicate acts such as murdering U.S. nationals or taking U.S. persons hostage abroad, Congress clearly indicated that a foreign enterprise could be the vehicle for carrying out those acts or the repository of any profit that resulted. See 18 U.S.C. 1962(a), (c); Pet. App. 98a (Lynch, J., dissenting) (Section 1962(c) is "primary prohibition in RICO"); *id.* at 99a-104a.

That conclusion is bolstered by RICO's requirement that an enterprise that is the vehicle of racketeering activity, or its prize or victim, must be one that "is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. 1962(a)-(c). That means that the enterprise must participate in or have an impact on commerce between the States or between this country and a foreign country. See, *e.g.*, *United States* v. *Clark*, 435 F.3d 1100, 1113-1114 (9th Cir. 2006), cert. denied, 549 U.S. 1343 (2007). Wholly foreign enterprises divorced from domestic concerns lie outside RICO's compass. In addition, several of the underlying RICO predicates have extraterritorial application when the criminal is a U.S. person—a further linkage between the United States and any enterprise whose "affairs" are being conducted "through a pattern of racketeering activity" of which that act is part. 18 U.S.C. 1962(c); see, *e.g.*, 18 U.S.C. 1957(d)(2), 2332a(b), 2423(b)-(c). Thus, no reason exists to fear that without a domestic-enterprise rule Section 1962 will sweep so broadly as to capture cases involving enterprises that have no ties to the United States.

Imposing a domestic-enterprise requirement in cases in which some or all of the racketeering activity takes place on foreign soil would frustrate Congress's purposes and give rise to harmful consequences. Congress incorporated predicate offenses with extraterritorial application into RICO in recognition that "a pattern of such crimes strikes at American interests," Pet. App. 101a (Lynch, J., dissenting)—and most of those offenses apply extraterritorially only in limited circumstances in which the harm to those interests is quite apparent, see App. B, *infra*. A pattern of such racketeering "strikes at American interests" no less when it is carried out at the behest of a foreign enterprise, or when a foreign enterprise is taken over or financially strengthened as a result of the racketeering, so that it may lash out at the United States in the future. A contrary conclusion would immunize defendants involved with foreign criminal organizations, including terrorist groups, from RICO, despite Congress's concern with the specific threats that those enterprises pose.

c. Petitioners' attack on the court of appeals' ruling that Section 1962 covers foreign enterprises is flawed. First, petitioners argue (Br. 36) that the statutory focus on the "corruption" of domestic enterprises is "particularly obvious as to § 1962(a) and (b)." But while Congress was concerned with infiltration of legitimate enterprises, its overarching goal was "to deal with the unlawful activities of those engaged in organized crime," 84 Stat. 923—that is, with the pattern of crimes that cause harm to victims. A foreign enterprise that was captured through federal criminal racketeering acts may become a launching pad for further and more pernicious criminal activity—

including domestic crimes. 18 U.S.C. 1962(a)-(c) (enterprise must engage in or affect interstate or foreign commerce). Such a corrupted enterprise can allow crimes to be committed more efficiently, with more resources and greater frequency, than would be possible without the framework or revenues that the enterprise provides. Precisely because an enterprise that was initially a victim or prize of racketeering activity can be used to conduct further criminal activity, Congress would indeed have been "concerned with * * * investments in, or acquisitions of, foreign enterprises." Br. 37. Limiting Section 1962's application to domestic enterprises alone is inconsistent with that goal.

Second, petitioners are wrong to claim (Br. 36-37) that "[e]ven for § 1962(c), Congress's concern does not clearly extend to foreign enterprises." An initially "corrupt" enterprise is a threat *because* of its criminal conduct. *Scheidler*, 510 U.S. at 259 (enterprise in Section 1962(c) is "vehicle" for crime). And when the enterprise's affairs are conducted through a pattern of RICO predicate crimes, the heightened dangers posed to the United States exist, whether the enterprise is centered in New York or operating out of Europe, Asia, or the Middle East.

Finally, petitioners insist (Br. 30-31) that RICO is not an "aggravating statute that simply adds new consequences to the predicate offenses." Pet. App. 77a (Raggi, J., dissenting). It is true that the predicate offenses alone do not violate Section 1962. But racketeering acts that make up a pattern are central to the existence of such a violation, see, *e.g.*, *Malley-Duff & Assocs.*, 483 U.S. at 154, and "[t]hose acts are, when committed in the circumstances delineated in

[Section] 1962[], 'an activity which RICO was designed to deter,'" *Sedima*, 473 U.S. at 497. As the court of appeals concluded, when the predicate acts have extraterritorial application, RICO is designed to deter their commission whether the enterprise is foreign or domestic. See Pet. App. 15a.[9]

2. Although this Court should decline petitioners' invitation to create a new domestic-enterprise requirement, the Court also need not reach the issue in this case. Respondents allege that petitioners—corporations located in the United States—"directed, managed, and controlled a global money-laundering scheme" as part of an association-in-fact enterprise. Pet. App. 2a, 237a-238a. If categorizing such an enterprise as domestic or foreign were thought necessary, it would qualify as domestic.

RICO's "broad" definition of enterprise, *Boyle*, 556 U.S. at 944, includes not only any formal "legal entity" but also "any * * * group of individuals associated in fact," *Turkette*, 452 U.S. at 580 (citation omitted). Such an informal association must have some structure. See *Boyle*, 556 U.S. at 946. But "[m]embers of the group need not have fixed roles," let alone hierar-

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[9] The RICO statutory provisions on which petitioners rely (*e.g.*, Br. 33, 37) do not suggest otherwise. Dissolution of an enterprise is not the only remedy the government can obtain in a civil RICO suit; the government can ask for any "appropriate orders" to "prevent and restrain" Section 1962 violations. 18 U.S.C. 1964(a). And while a criminal defendant convicted of a RICO violation must forfeit any "interest" in an enterprise he has been involved with in violation of Section 1962, 18 U.S.C. 1963, such forfeiture does not extend judicial authority over entities not before the court; rather, it is a means of punishing the defendant by requiring surrender of his own property.

chical relationships, and decisions can be made "by any number of methods." *Id.* at 947-948.

An association-in-fact enterprise therefore may have a presence in numerous locations. If a domestic corporation, domiciled and regularly transacting business here, is alleged to have been a member of such an enterprise, the enterprise itself should be deemed domestic in any RICO action against the corporation. Here, taking the allegations of the complaint as true, petitioners had a significant role in the activities of the "RJR Money-Laundering Enterprise" (*e.g.*, Pet. App. 238a), and it therefore had a domestic presence. Moreover, such a domestic presence comes within one of the focuses of Section 1962's concern, which include preventing the use of legitimate businesses as enterprises to conduct racketeering activity. 18 U.S.C. 1962(c); see *H.J.*, 492 U.S. at 243.

The district court reached a different conclusion by employing a "nerve center" test and reading the complaint to assert that foreign "criminal organizations" planned the alleged scheme. Pet. App. 48a-52a. That test was created to ascertain the location of a *corporation's* "principal place of business"—that is, "the place where the corporation's high level officers direct, control, and coordinate the corporation's activities." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 80 (2010). But an association-in-fact enterprise need not have a chain of command or centralized decision making, and therefore may well have no nerve center at all. Accordingly, the test is not a sensible tool for determining whether an association-in-fact enterprise is domestic or foreign.

C. A Private RICO Plaintiff Must Allege A Domestic Injury

The court of appeals ruled that RICO does not "require[] private plaintiffs to allege a domestic injury," concluding that a plaintiff injured abroad can invoke RICO in a private suit if he can establish that such injury "was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad." Pet. App. 55a, 57a-58a. As petitioners correctly argue (Br. 44-60), that ruling is erroneous. Because Congress did not clearly indicate an intent to permit foreign injuries to give rise to private RICO actions, a result that could have serious ramifications for foreign relations, Section 1964(c) should be interpreted to contain a domestic-injury requirement.

1. A criminal or civil RICO action instituted by the government is premised solely on a violation of Section 1962. See 18 U.S.C. 1963(a) ("[w]hoever violates any provision of [S]ection 1962 * * * shall be fined under this title or imprisoned"); 18 U.S.C. 1964(a)-(b) (authorizing Attorney General to "institute proceedings" to "prevent and restrain violations of [S]ection 1962"). Accordingly, in a government action, the permissible extraterritorial sweep of RICO turns solely on analysis of that provision.

With respect to a civil RICO action brought by a private plaintiff, however, a violation of Section 1962 is not sufficient. Under Section 1964(c), a separate provision that sets forth RICO's private right of action, a private plaintiff must also establish that he has been "injured in his business or property by reason of a violation of [S]ection 1962," 18 U.S.C. 1964(c); that the injury was proximately caused by the violation,

Holmes v. *Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992); *Beck*, 529 U.S. at 505-507; and that the injury has given rise to damages, in which case the plaintiff "shall recover threefold the damages he sustains," 18 U.S.C. 1964(c).[10] Thus, activity "unlawful" under Section 1962, and therefore prosecutable by the United States, may nevertheless fail to support a private RICO action—as, for example, where the act involves injury to a person, or where the act is too attenuated from a plaintiff's property-related injury, see *Holmes*, 503 U.S. at 270.

2. Assessing whether Section 1964(c) contains a domestic-injury requirement does not involve a "typical[]" application of the presumption against extraterritoriality, which is generally used to "discern whether an Act of Congress regulating conduct applies abroad." *Kiobel*, 133 S. Ct. at 1664. Nevertheless, the "principles underlying th[at] canon of interpretation" continue to "constrain" the determination of whether a foreign injury suffices to meet Section 1964(c)'s requirements. *Ibid.*; see *Small* v. *United States*, 544 U.S. 385, 388-389 (2005).

One such principle is avoiding "unintended clashes between our laws and those of other nations which could result in international discord," lest "the Judiciary * * * erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Kiobel*, 133 S. Ct. at 1664 (citations omitted); see *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (Congress can decide policy "where the possi-

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[10] Moreover, a private RICO plaintiff may not "rely upon * * * fraud in the purchase or sale of securities" unless the fraudster has been "criminally convicted." 18 U.S.C. 1964(c).

bilities of international discord are so evident and retaliative action so certain"). That principle animates the rule that this Court ordinarily "construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-LaRoche Ltd.* v. *Empagran, S.A.*, 542 U.S. 155, 164 (2004); see *id.* at 164-165.

When the United States decides to bring a RICO prosecution or civil suit, it takes into account the possibility of such "unintended clashes," *Kiobel*, 133 S. Ct. at 1664, and "unreasonable interference," *Empagran*, 542 U.S. at 164. Before the government prosecutes any defendant for a criminal RICO violation, it conducts a centralized review to determine whether such a prosecution is warranted. See *U.S. Attorneys' Manual* §§ 9-110.101, 9-110.210 to 9-110.400. And if the prosecution would involve acts of racketeering committed on foreign soil in violation of predicate provisions with extraterritorial reach, the government is in a good position to assess the relevant country's sovereign interests and, if necessary, to deal with that country directly in an attempt to avoid any adverse consequences. See *Pasquantino*, 544 U.S. at 369 (by bringing wire fraud prosecution based on defrauding Canada of tax revenue, "the Executive has assessed this prosecution's impact on * * * Canada, and concluded that it poses little danger of causing international friction"); see generally *Empagran*, 542 U.S. at 170-171.

In contrast, "private plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." *Empagran*, 542 U.S. at 171 (quoting Joseph P. Griffin, *Extraterritori-*

ality in U.S. and EU Antitrust Enforcement, 67 Antitrust L.J. 159, 194 (1999)). And private suits involving injuries suffered outside the United States have a propensity to produce significant international friction. Other nations may perceive our affording a private remedy to foreign plaintiffs as circumventing the (often more limited) causes of action and remedies that those nations provide their own citizens, particularly when a plaintiff's principal grievance is with foreign conduct or entities. See, *e.g.*, *Empagran*, 542 U.S. at 167 (disagreements over remedies can be source of international discord).

Special caution is therefore required in assessing the extraterritorial applicability of Section 1964(c)'s private right of action, and the hurdle for showing that Congress clearly intended to allow private RICO actions on the basis of a foreign injury is a high one. Cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) (discussing creation of private right of action and stating that "the possible collateral consequences of making international rules privately actionable argue for judicial caution"); *Empagran*, 542 U.S. at 166 ("Why is it reasonable to apply [U.S. antitrust] law to conduct that is significantly foreign insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?") (emphasis omitted).

That hurdle has not been surmounted here. Section 1964(c), which is narrower than Section 1962, contains no indication that a foreign injury can give rise to a private RICO claim, see *Morrison*, 561 U.S. at 265—and allowing a plaintiff who suffered a RICO-related injury abroad to bring a private suit in the United States seeking treble damages has real poten-

tial to cause difficulties vis-à-vis the country where the injury took place, which may well seek to regulate the matter under its own legal framework.[11] Cf. *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390 (2015). Nor is permitting such a suit necessary in order for RICO to function effectively and fulfill its purposes. Accordingly, absent a showing of domestic injury, a Section 1964(c) action should be dismissed.

3. In interpreting Section 1964(c) to encompass foreign injury, the court of appeals did not discuss any of those considerations. Rather, the court's analysis turned on *Sedima*, *supra*, which the court understood to require examination of "the relevant predicate statute to determine whether the injury caused by a violation thereof must be domestic." Pet. App. 57a.

Nothing in *Sedima*—which did not involve any extraterritoriality question—dictates the result reached by the court of appeals. In that case, the Court held that a private plaintiff need not allege a "distinct 'racketeering injury'" to bring suit under RICO's private right of action. 473 U.S. at 495. Interpreting Section 1964(c) to include a domestic-injury requirement does not contradict that holding. A plaintiff need not show an injury distinct from that caused by the underlying racketeering activity in order to establish a domestic injury; the plaintiff simply must show where the injury arising from that underlying activity took place.

4. In this case, the complaint alleges injury that is largely foreign. See p. 5, *supra*. The complaint also,

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[11] Although this case presents an unusual situation in which foreign governments are plaintiffs, the injury rule adopted by this Court will govern suits brought by non-governmental plaintiffs as well.

however, alleges that respondents suffered harm in the United States by losing cigarette sales that they would otherwise have made as market participants. See *ibid.*; Pet. Br. 59-60. Because the courts below did not impose a domestic-injury requirement, they had no occasion to consider whether that allegation was a plausible one and, if so, whether it was sufficient to support any of respondents' RICO claims. The lower courts should be permitted to make those determinations in the first instance.

CONCLUSION

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 1961 provides:

Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship pa-

pers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314

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[1] So in original.

and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring

certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and

(B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the inves-

tigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

2. 18 U.S.C. 1962 provides:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirect-

ly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

3. 18 U.S.C. 1963 provides:

Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter

shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the

property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys for-

feited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeitted property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (*l*), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in

such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in re-

buttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

4. 18 U.S.C. 1964 provides:

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enter-

prise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

5. 18 U.S.C. 1965 provides:

Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

6. 18 U.S.C. 1966 provides:

Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action.

7. 18 U.S.C. 1967 provides:

Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

8. 18 U.S.C. 1968 provides:

Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person,

a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall—

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall—

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by—

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such

custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the con-

clusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of—

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility

for the custody and control of such material, the Attorney General shall promptly—

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter,

such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

APPENDIX B

Selected RICO Predicates With Extraterritorial Application

18 U.S.C. 37(b): providing for jurisdiction over, *inter alia*, acts of violence against a person at an international airport "outside the United States," if (1) the offender is found in the United States or (2) the offender or victim is a national of the United States;

18 U.S.C. 175(a): providing for "extraterritorial Federal jurisdiction" over certain offenses involving biological weapons when committed by or against a U.S. national;

18 U.S.C. 175c(b): providing for jurisdiction over certain offenses involving the variola virus if the offense is (1) committed "outside of" the United States by a U.S. national; (2) committed against a U.S. national "while the national is outside" the United States; or (3) committed against property that is owned, leased, or used by the United States "whether the property is within or outside" the United States;

18 U.S.C. 229(c): providing for jurisdiction over certain chemical weapons offenses if the offense (1) "takes place outside" of the United States and is committed by a U.S. national, (2) is committed against a U.S. national while the national is outside the United States, or (3) is committed against U.S. property "whether the property is within or outside" the United States;

18 U.S.C. 351(i): providing for "extraterritorial jurisdiction" over assassination, kidnapping, or assault of an individual who is, *inter alia*, a Member of Congress, a sen-

ior Executive Branch official, or a Justice of the United States;

18 U.S.C. 831(c)(3): criminalizing certain offenses involving nuclear material committed "outside the United States" if the defendant is found in the United States;

18 U.S.C. 832(b): providing for "extraterritorial Federal jurisdiction" over offenses involving participation in a nuclear weapons program or other weapons of mass destruction program of a foreign terrorist power;

18 U.S.C. 1029(h): criminalizing fraud and related activity in connection with an "access device" committed "outside the jurisdiction of the United States" under specified circumstances;

18 U.S.C. 1116(c): providing for jurisdiction over murder or manslaughter of an "internationally protected person outside the United States * * * if (1) the victim is a representative, officer, employee, or agent of the United States, (2) an offender is a national of the United States, or (3) an offender is afterwards found in the United States";

18 U.S.C. 1203(b): criminalizing certain acts of hostage taking committed "outside the United States" if (1) the offender or hostage is a U.S. national, (2) the offender is found in the United States, or (3) the offender sought to compel the United States Government to do or abstain from doing any act;

18 U.S.C. 1512(h): providing for "extraterritorial Federal jurisdiction" over certain offenses involving witness, victim, informant, or evidence tampering, committed in

connection with an official proceeding in the United States;

18 U.S.C. 1513(d): providing for "extraterritorial Federal jurisdiction" over certain offenses involving retaliation against a witness, victim, or informant in connection with an official proceeding in the United States;

18 U.S.C. 1585: criminalizing the seizure "on any foreign shore [of] any person with the intent to make that person a slave" if committed by (1) a U.S. citizen or resident who is a crewmember on a foreign vessel engaged in the slave trade, or (2) a crewmember of "any vessel owned in whole or in part, or navigated for, or in behalf of, any citizen of the United States";

18 U.S.C. 1586: criminalizing U.S. citizen or resident's service on a vessel used "in the transportation of slaves from any foreign country or place to another";

18 U.S.C. 1596(a): providing for "extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit any offense) under" section 1581 (peonage), 1583 (enticement into slavery), 1584 (sale into involuntary servitude), 1589 (forced labor), 1590 (human trafficking), or 1591 (sex trafficking) if the offender is (1) a U.S. national or permanent resident, or (2) present in the United States, irrespective of nationality;

18 U.S.C. 1751(k): providing for "extraterritorial jurisdiction" over crimes involving the assassination, kidnapping, or assault of a U.S. President or other enumerated officials;

18 U.S.C. §1956(f): providing for "extraterritorial jurisdiction" over money laundering offenses under specified circumstances;

18 U.S.C. 1957(d)(2): criminalizing monetary transactions in property derived from specified unlawful activity if the offense "takes place outside the United States" but "the defendant is a United States person";

18 U.S.C. 2260: criminalizing conduct related to the production of sexually explicit depictions of a minor "outside the United States" where the defendant intends the visual depiction to be imported or transmitted into the United States;

18 U.S.C. 2280(b): providing for jurisdiction over certain offenses of violence against maritime navigation committed outside the United States and its territorial seas under specified circumstances;

18 U.S.C. 2280a(b): providing for jurisdiction over certain offenses against maritime navigation involving weapons of mass destruction committed outside the United States and its territorial seas under specified circumstances;

18 U.S.C. 2281(b): providing for jurisdiction over certain offenses of violence against or on board a maritime fixed platform located on the continental shelf of another country where the offense is committed, *inter alia*, by a U.S. national;

18 U.S.C. 2281a(b): providing for jurisdiction over additional offenses against or on board a maritime fixed platform located on the continental shelf of another country

where the offense is committed, *inter alia*, by a U.S. national;

18 U.S.C. 2332(a): criminalizing killing "a national of the United States, while such national is outside the United States";

18 U.S.C. 2332a: criminalizing the use, attempted use, threatened use, or conspiracy to use a weapon of mass destruction (1) "against a national of the United States while such national is outside of the United States," (2) against U.S. property located outside the United States, or (3) outside the United States by a U.S. national;

18 U.S.C. 2332f(b)(2): providing for jurisdiction over certain offenses involving bombing of a place of public use, government facility, public transportation system, or infrastructure facility "outside the United States" where, *inter alia*, a perpetrator or a victim is a U.S. national;

18 U.S.C. 2332g(b): providing for jurisdiction over certain offenses involving missile systems designed to destroy aircraft where, *inter alia*, the offense is committed by or against a U.S. national "outside the United States";

18 U.S.C. 2332h(b): providing for jurisdiction over certain offenses involving radiological dispersal devices where, *inter alia*, the offense is committed by or against a U.S. national "outside the United States";

18 U.S.C. 2332i(b): providing for jurisdiction over certain acts of nuclear terrorism committed "outside of the United States" where, *inter alia*, the offense is committed by or against a U.S. national, corporation, or legal entity;

18 U.S.C. 2339B(d)(2): providing for "extraterritorial Federal jurisdiction" over offenses relating to the provision of material support or resources to designated foreign terrorist organizations;

18 U.S.C. 2339C(b)(2): providing for jurisdiction over offenses relating to terrorist financing "tak[ing] place outside the United States" where, *inter alia*, the offense is committed by or against a U.S. national;

18 U.S.C. 2339D(b): providing for "extraterritorial Federal jurisdiction" over offenses relating to the receipt of military-type training from a foreign terrorist organization where, *inter alia*, the offender is a U.S. national or the offender is brought into or found in the United States;

18 U.S.C. 2340A: criminalizing torture committed "outside the United States" and providing for jurisdiction if the offender is a U.S. national or is present in the United States;

18 U.S.C. 2423(c): criminalizing illicit sexual conduct in foreign places by a U.S. citizen or permanent resident under specified circumstances;

21 U.S.C. 959: criminalizing "acts of manufacture or distribution [of a controlled substance] committed outside the territorial jurisdiction of the United States" with the intent or knowledge that the substance will be imported into the United States;

21 U.S.C. 960a(b): providing for jurisdiction over specified offenses related to narco-terrorism involving conduct "outside the United States";

42 U.S.C. 2122(b): providing for jurisdiction over certain offenses involving atomic weapons where, *inter alia*, the offense is committed by or against a U.S. national "outside the United States" or against U.S. property "outside the United States";

46 U.S.C. 70503: criminalizing the manufacture, distribution, or possession of a controlled substance by a U.S. citizen or resident alien on board any vessel or by any individual on board a vessel of the United States, "even though the act is committed outside the territorial jurisdiction of the United States";

49 U.S.C. 46502: criminalizing "aircraft piracy" both "in the special aircraft jurisdiction of the United States"* and "on an aircraft in flight outside the special aircraft jurisdiction of the United States" and providing for jurisdiction over the latter offense where (1) a U.S. national was aboard the aircraft, (2) the offender is a U.S. national, or (3) the offender is found in the United States;

49 U.S.C. 46504, second sentence: criminalizing assault or intimidation of flight crew or attendants on board an aircraft in the special aircraft jurisdiction of the United States*;

49 U.S.C. 46506: criminalizing homicide or attempted homicide committed by an individual on an aircraft in the special aircraft jurisdiction of the United States.*

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* 49 U.S.C. 46501(2) defines the term "special aircraft jurisdiction of the United States" to include "aircraft outside the United States" under specified circumstances.

No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* THE NATIONAL FOREIGN TRADE COUNCIL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The National Foreign Trade Council ("NFTC") is the premier business organization advocating for public policies to foster open, rules-based international trade and investment. Founded in 1914 by a group of American companies that supported an open-world trading system, the NFTC and its affiliates now serve more than 300 member companies. Its fifty-member board of directors includes some of America's largest and most iconic businesses, spanning all sectors of the economy—from Google to Wal-Mart, Coca Cola to Ford, Chevron to Pfizer.

SUMMARY OF ARGUMENT

Five years ago, in *Morrison v. National Australia Bank Ltd.*, this Court unambiguously held that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. 247, 255 (2010). Three years later, this Court reaffirmed that holding in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). In *Morrison* and *Kiobel*, the Court stressed that the presumption against the extraterritorial application of United States law (the "Extraterritoriality

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *Amicus* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Letters from the parties consenting to the filing of all *amici* briefs have been filed with the Clerk of the Court.

Presumption") prevents the United States from turning into a "Shangri-La" for plaintiffs' lawyers', by closing the courts to claims that have little, if any, connection to the United States. Without the Presumption, plaintiffs' lawyers from around the world would be free to use the American judicial system—with its class actions, broad and protracted discovery, and no "loser-pays" rules—to bring claims for injuries suffered abroad as a result of foreign conduct, even when the conduct in question is not actionable in the jurisdiction where it occurred.

The Second Circuit's decision below undoes much of what *Morrison* and *Kiobel* accomplished in limiting the extraterritorial reach of U.S. law. Permitted to stand, the Second Circuit's holding would, for the first time, open U.S. courts to claims by *foreign* plaintiffs suing for *foreign* injuries caused by *foreign* conduct perpetrated by a *foreign* enterprise. That result is precisely what *Morrison* and *Kiobel* sought to avoid.

This is not a theoretical concern. On the contrary, the present case proves the point. Here, rather than bringing an action in their own courts, foreign governments seek to sue in the United States under United States law for injuries purportedly suffered in Europe as a result of conduct committed in Europe by various foreign actors. Left undisturbed, the Second Circuit's decision to allow this action to proceed will task the U.S. court system with the function of adjudicating worldwide claims of corporate misconduct under U.S. law, even though the conduct giving rise to the litigation may not be actionable in the jurisdiction where it occurred. This Court has previously rejected exactly such an extraterritorial application of U.S. law: "to apply our remedies would

unjustifiably permit [foreign] citizens to bypass their own [countries'] less generous remedial schemes . . . ." *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167 (2004).

Amicus respectfully submits that the Second Circuit's decision should be reversed for at least three reasons. *First*, the Second Circuit improperly held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* (2012), has extraterritorial application to the extent that one of its predicate statutes has extraterritorial reach. That holding is at odds with both this Court's clear holdings in *Morrison* and *Kiobel*, as well as decades-long precedent that RICO is silent as to any extraterritorial application. *Amicus* thus endorses Petitioner's argument that, under *Morrison*, RICO lacks extraterritorial reach and can be invoked only where, unlike here, the claim is based on the conduct of a domestic enterprise. *See infra* Part I.

Second, even if the Court rejects that contention, the Second Circuit's decision still should be reversed because RICO's private right of action, codified in Section 1964(c), requires the showing of a domestic injury. Section 1964(c)'s plain text and legislative history make clear that in enacting Section 1964(c), Congress was focused on remedying injuries caused by violations of RICO. As Section 1964 is silent as to its extraterritorial reach, it has none. Therefore, a viable civil RICO claim must establish a domestic injury for which the plaintiffs seek recovery. *See infra* Part II.A-B. The Second Circuit's reasoning that Section 1964(c)'s reach should extend to any injury, wherever suffered, caused by a violation of a RICO predicate that has extraterritorial reach, is unpersuasive because this Court's precedent

(i) requires that the extraterritorial reach of each statutory provision be considered independently, (ii) makes clear that RICO's predicates are separate from RICO itself, and (iii) establishes that even where a conduct-regulating law has extraterritorial reach, there is no private right of action in U.S. courts for a violation of that law unless the procedural statute creating the private right of action also has extraterritorial application. *See infra* Part II.C. Moreover, the legislative history of RICO's extraterritorial predicates, relied on by the Second Circuit, also supports the rejection of the Second Circuit's approach. *See infra* Part II.D.

Third and finally, limiting Section 1964(c)'s reach to domestic injuries is consistent with the policy considerations endorsed by this Court in *Morrison* and *Kiobel*. As a threshold matter, under the Second Circuit's ruling, many of the claims that the Supreme Court found to be barred by the Extraterritoriality Presumption in *Morrison* and *Kiobel* could now be resurrected as RICO claims. Were this to happen, it would lead to the absurd result that the Extraterritoriality Presumption barred certain claims but permitted civil RICO claims based on the same foreign conduct, with the result that NFTC's members' exposure to such claims would increase threefold. This is certainly not what RICO—a statute designed to combat the impact of organized crime in the United States—was meant to accomplish. *See infra* Part III. Nor can it be the result contemplated by this Court in *Morrison* and *Kiobel*.

Moreover, interpreting Section 1964(c) to permit claims based on foreign injuries would impose significant burdens on U.S. companies doing business abroad, as well as foreign businesses choosing to

invest in the United States. This is particularly troubling here, since RICO is, on the one hand, so broad that almost any tort claim can be asserted as a RICO claim and, on the other hand, provides for damages so severe as to be considered by some courts the equivalent of a "thermonuclear device" of civil litigation. This Court should decline Respondent's invitation to convert this nation's courts into quasi-global courts permitted to adjudicate claims that have little, if any, connection to the United States.

ARGUMENT

I. *Amicus* Agrees With Petitioners That A Cognizable RICO Claim Requires A Showing Of A Domestic Enterprise

Amicus endorses Petitioners' contention that Section 1962, which contains RICO's substantive prohibition, does not extend to foreign enterprises. *See* Pet'rs' Br. 24-38. This conclusion is dictated by RICO's plain language, which numerous lower courts have found to be "silent" as to the statute's extraterritorial reach. *See United States v. Chao Fan Xu*, 706 F.3d 965, 974 (9th Cir. 2013) ("RICO is silent as to its extraterritorial application. . . . [Therefore, as o]ther Courts that have addressed the issue have uniformly held . . . RICO does not apply extraterritorially."); *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010) ("[Second Circuit] precedent holds that RICO is silent as to any extraterritorial application." (internal quotation marks omitted)); *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996) ("[RICO] is silent as to any extraterritorial application."). Accordingly, under this Court's holdings in *Morrison* and *Kiobel*, RICO

lacks any extraterritorial application. *See Morrison*, 561 U.S. at 255; *Kiobel*, 133 S. Ct. at 1664.

Applying *Morrison*'s framework, determining whether a particular application of RICO is appropriately domestic, or impermissibly extraterritorial, requires identifying Congress's "focus" in passing Section 1962. *Morrison*, 561 U.S. at 266-67. Thus, when the transaction or act that is the object of the statute's solicitude occurs in the United States, the application of the statute is appropriately domestic, even if the law suit otherwise involves extraterritorial activity. *See id.* at 267.

As Petitioners have demonstrated, Pet'rs' Br. 24-38, Section 1962's focus is on the corruption of an "enterprise," not the predicate acts by which the corruption is achieved. Indeed, this Court has previously observed that RICO's "primary purpose" was to address the corruption of businesses—i.e. enterprises—by organized crime. *United States v. Turkette*, 452 U.S. 576, 591 (1981); *see also United States v. Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986) ("The central role of the concept of enterprise under RICO cannot be overstated."); *Cedeño v. Intech Grp., Inc.*, 733 F. Supp. 2d 471, 473-74 (S.D.N.Y. 2010) (Rakoff, J.) ("[T]he focus of RICO is on the enterprise" and "nowhere does [RICO] evidence any concern with foreign enterprises, let alone a concern sufficiently clear to overcome the presumption against extraterritoriality."). Accordingly, a viable RICO action requires the showing of a domestic "enterprise." *See Morrison*, 561 U.S. at 266-67.

The "enterprise" test is superior to a test focusing on RICO's predicates or a defendant's pattern of conduct because it best serves the goals of

determinacy and predictability. *See id.* at 256 (criticizing the Second Circuit's conduct-and-effects test as "complex in formulation and unpredictable in application"). The usability of the "enterprise" test, established by identifying the enterprise's nerve center (where the decisions to engage in the offending conduct were made, *see Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010)), would provide courts and litigants with a clear and definitive standard for determining which entities are subject to RICO claims (those with a nerve center located in the United States) and which were not (those with a nerve center located outside of the United States). *See id.* at 95; *see also Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014) (observing that a corporation's primary place of business (i.e., its nerve center) is easily ascertainable).

II. Even If The Court Finds That RICO Does Not Require A Showing Of A Domestic Enterprise, The Second Circuit's Decision Should Be Reversed Because A Civil RICO Claim Requires The Showing Of A Domestic Injury

Even if the Court does not construe RICO as governing only domestic enterprises, the Second Circuit's decision should be reversed because whatever the extraterritorial reach of RICO's criminal prohibition, recovering on a civil RICO claim requires the showing of a domestic injury.

RICO's Section 1964(c) permits "[a]ny person injured in his business or property by reason" of a RICO violation to sue "in any appropriate United States district court" and, if the claim is successful, to recover treble damages and attorneys' fees. 18 U.S.C.

§ 1964(c). Applying *Morrison* to determine the appropriate territorial reach of RICO's private right of action requires courts to identify Section 1964(c)'s focus. 561 U.S. at 266-67. Each of Section 1964(c)'s plain language, applicable precedent, and legislative history compels the conclusion that in creating a private right of action under RICO, Congress was focused on remedying "injuries" caused by RICO's violations. Thus, because Section 1964(c), like the rest of RICO, reflects no clear congressional intent that it apply extraterritorially, a plaintiff cannot sustain a civil RICO action unless it has suffered an injury in the United States.

A. The Plain Language Of Section 1964(c) Requires The Showing Of A Domestic Injury

Section 1964(c)'s plain text shows that its focus is on an "injur[y]" caused by a RICO violation. Specifically, Section 1964(c) affords "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter" a right of action in United States courts. 18 U.S.C. § 1964(c). The focus, then, is not on the substance of a RICO violation, which is addressed by Section 1962, but on the injury suffered as a result of that violation. Indeed, the sole purpose (i.e., focus) of Section 1964(c) is to provide something that Section 1962 does not provide: an opportunity for a private party to redress injury incurred as a result of a RICO violation. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 183 (1997) (Section 1964 is a "special . . . provision" permitting those "injured" by a criminal violation of RICO "to recover treble damages and attorney's fees"). Thus, Section 1964(c)'s plain language demonstrates that the remedial focus of Section 1964(c) is on the injury

caused by a RICO violation, rather than the violation itself. *See Morrison*, 561 U.S. at 266-67 (Section 10(b) is focused not on the fraud or deception in connection with the purchase or sale of the security, but on the *purchase or sale of the security occasioned by the fraud*).

Not surprisingly, this Court and several lower courts have reached precisely this conclusion. For example, in *Shearson/American Express, Inc. v. McMahon*, this Court examined the purpose of Section 1964(c) at length and found that in passing Section 1964(c), the "'focus' of Congressional concern," *Morrison*, 561 U.S. at 266, was Section 1964(c)'s "remedial function." *Shearson*, 482 U.S. 220, 241 (1987). That is, in enacting Section 1964(c), Congress was focused on the ability of those *injured* by criminal conduct to obtain a civil remedy. *Id.* at 240-41.[2]

Several courts considering RICO's extraterritorial reach appear to have reached the same conclusion. For example, in *Norex*, the Second Circuit held that even though U.S.-based actors engaged in U.S.-based conduct, the plaintiff's civil RICO claim was barred by the Extraterritoriality Presumption because the alleged injury occurred outside of the United States.

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[2] Respondent's argument below—that a civil RICO claim need not be based on a domestic injury because Section 1964(c)'s focus is on the policing function of turning "victims" "into prosecutors," Reply Brief for Plaintiff-Appellants at 23, *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014) (No. 11-2475-cv)—is also foreclosed by *Shearson*, in which the Court expressly found that this policing function "was a secondary concern" and that Congress' primary focus was on providing victims a remedy for their injuries. 482 U.S. at 240-41.

631 F.3d at 33. Specifically, the injury occurred in the Russian Federation, where Norex was deprived of its ownership stake in a Russian oil company and certain quantities of oil owed to it by various Russian entities. *See Norex Petroleum Ltd. v. Access Indus., Inc.*, 540 F. Supp. 2d 438, 440 (S.D.N.Y. 2007). Noting that *Norex* involved a "private lawsuit pursuant to 18 U.S.C. § 1964(c)," the Second Circuit dismissed the civil RICO claim as barred by the Extraterritoriality Presumption. 631 F.3d at 33. While the Second Circuit did not expressly ground its dismissal of the complaint on the lack of a domestic injury, it must have done so as the complaint alleges both a domestic enterprise and a number of predicate acts occurring in the United States. *Id.* at 31.[3] Similarly, in *Cedeño v. Castillo*, in which the plaintiffs alleged purely foreign injuries, the Second Circuit affirmed dismissal of their civil RICO claims as barred by the Extraterritoriality Presumption despite plaintiffs' express argument that the claims were based on violations of predicate offenses that had extraterritorial reach. 457 F. App'x. 35 (2d Cir. 2012). Section 1964(c)'s language and applicable

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[3] Furthermore, the Second Circuit expressly limited its holding to civil RICO claims brought under Section 1964(c), stating that it "express[ed] no opinion" on the extraterritorial reach of RICO claims brought by the government under Sections 1963, 1964(a) or 1964(b). *Norex*, 631 F.3d at 33. Like Section 1964(c), these sections of RICO incorporate by reference Section 1962, and, through it, the various predicate statutes. Therefore, the Second Circuit's decision in *Norex* must have been based on a unique part of Section 1964(c) that is not present in Sections 1963, 1964(a), or 1964(b)—the requirement that a plaintiff show "an injury." *See Clark v. Martinez*, 543 U.S. 371, 386 (2005) (Judges cannot "give the same statutory text [here, section 1962] different meanings in different cases").

precedent establish that its focus is on remedying an injury suffered as a result of a RICO violation, and therefore a viable civil RICO claim requires the showing of a domestic injury.

B. Section 1964(c)'s Legislative History Confirms That Section 1964(c) Requires A Showing Of A Domestic Injury To Make Out A Civil RICO Claim

Because Section 1964(c)'s plain language compels the conclusion that a domestic injury is required, there is no need to consider legislative history. *United States v. Gonzales*, 520 U.S. 1, 6 (1997). Nevertheless, Section 1964(c)'s legislative history confirms the same result. As a threshold matter, nothing in Section 1964(c)'s legislative history suggests that Congress intended Section 1964(c) to open U.S. courts to foreign plaintiffs seeking redress for foreign injuries. The opposite is true. Congressional records surrounding RICO's enactment consistently and exclusively focus on the impact that organized crime had *in the United States*, not outside of it. For example, RICO's statement of findings and purpose expressly states that "[i]t is the purpose of this Act to seek the eradication of organized crime *in the United States*." Pub. L. No. 91-452, 84 Stat. 922, 923 (emphasis added); *see also* 115 CONG. REC. 9568 (1969) (discussing RICO's immediate predecessor, and noting that "the declared policy of the Congress [is] to eradicate the baneful influence of organized crime in the *United States*") (emphasis added).

Limiting Section 1964(c)'s reach to encompass only claims seeking damages for domestic injuries is also consistent with the legislative model Congress used to craft RICO's civil-remedy provision. As this Court has

"repeatedly observed," Congress modeled § 1964(c) on the "civil-action provision of the federal antitrust laws." *Holmes v. Sec. Inv'r Prot. Corp.*, 503 U.S. 258, 267 (1992); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985) ("The clearest current in [RICO's] history is the reliance on the [antitrust] model."). Importantly, the antitrust civil-remedy provision, on which Section 1964(c) was modeled, has "long" been interpreted as only permitting claims that "redress *domestic* antitrust injury." *Empagran*, 542 U.S. at 165 (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.)); *United States v. Sisal Sales Corp.*, 274 U.S. 268, 276 (1927) (permitting antitrust claim based on foreign anticompetitive conduct to go forward because prohibited conduct resulted in antitrust injury in the United States); *Montreal Trading Ltd. v. Amax, Inc.*, 661 F.2d 864, 869-70 (10th Cir. 1981), *cert. denied*, 455 U.S. 1001 (1982) (no civil antitrust remedy in United States to redress antitrust injury suffered only in Canada).[4] As there is nothing in Section 1964(c)'s legislative history to suggest that, in crafting a civil RICO remedy, Congress intended to give Section 1964(c) a scope far exceeding the antitrust laws on which it was modeled, Section 1964(c) should be interpreted as authorizing a private right of action to redress only domestic, not foreign, injuries.

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[4] While *Empagran* interpreted the Foreign Trade and Antitrust Improvement Act of 1982, 15 U.S.C. § 6a (2012), a statute that is sometimes described as limiting the reach of the Sherman Act, it recognized that "no pre-1982 case provides significant authority for [the] application" of the Sherman Act's private right of action to redress purely foreign injury. *See Empagran*, 542 U.S. at 173.

C. Nothing Rebuts The Presumption That In Passing Section 1964(c), Congress Was Focused Only On Remedying Domestic Injuries

In sum, Section 1964(c)'s plain language, legislative history and applicable precedent all support limiting Section 1964(c) to claims seeking redress for domestic, but not foreign, injuries. The Second Circuit's holding to the contrary—based on the notion that the existence of extraterritorial predicates means that a showing of a domestic injury is not required[5]—fails for at least three independent reasons.

First, in determining which law suits fall within the territorial scope of Section 1964(c), the proper focus is on Section 1964(c), not on RICO as a whole, and certainly not on the dozens of separate statutes that make up RICO's predicates. *See, e.g.*, *Graham Cty. Soil & Water Conservation Dist. v. United States*, 559 U.S. 280, 292 (2010) (when identifying the focus of a statutory provision, courts should look to the provision itself, not the statute as a "whole"). Indeed, this Court has held that each statutory provision should be considered separately when determining its focus, as different statutory provisions may have different scopes and different objectives. *See, e.g.*, *Morrison*, 561 U.S. at 263-65 (focus of Exchange Act's Section 10(b) is different from that of Section 30); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441 (1989) (focus of Foreign Sovereign Immunities Act's commercial-activity exception is broader than tortious-act exception).

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[5] Pet. App. 11a, 57a-58a.

Thus, in *Morrison* this Court noted that when Congress gives one statutory provision extraterritorial reach but fails to do so for a different statutory provision, that omission supports the conclusion that the latter provision was not intended to apply extraterritorially. *See* 561 U.S. at 265 ("Subsection 30(a) contains what § 10(b) lacks: a clear statement of extraterritorial effect."); *id.* at 265 n.8 ("Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications."). Lower courts construing other statutes have held similarly. *See, e.g.*, *Sec. Inv'r Prot. Corp. v. Bernard L. Madoff Inv. Sec. Ltd.*, 513 B.R. 222, 228-30 (S.D.N.Y. 2014) (extraterritorial reach of Section 541 of the Bankruptcy Code "cannot supply any extraterritorial authority" that Sections 547 and 548 of the Bankruptcy Code "lack on their own"); *Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 328 (S.D.N.Y. 2013) (holding that even though "[t]he Dodd-Frank Act does have some extraterritorial application," the provision at issue is "silent" as to extraterritoriality and thus does not apply extraterritorially), *aff'd*, 763 F.3d 175 (2d Cir. 2014). Likewise, here, the fact that RICO's predicates—which are separate criminal statutes enacted at different times and for different purposes than RICO—may have extraterritorial reach does not rebut the presumption that Section 1964(c) does not. *See Norex*, 631 F.3d at 33 ("*Morrison* . . . forecloses Norex's argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach."); Pet. App. 79a, n.4 (Raggi, J., dissenting) ("The money laundering and material support predicates alleged here are proscribed by criminal statutes that explicitly provide for extraterritoriality. . . . The

RICO statute, however, does not admit such a conclusion.").

Second, extending Section 1964(c)'s reach to cover extraterritorial injury because certain RICO predicates have extraterritorial reach ignores, and is inconsistent with, years of instruction from this Court and several courts of appeals to treat RICO as an offense distinct from its predicate acts. *See Sedima*, 473 U.S. at 491 (RICO predicates must be established beyond a reasonable doubt, but a civil RICO claim need only be proven by a preponderance of the evidence); *United States v. Basciano*, 599 F.3d 184, 205 (2d Cir. 2010) (prosecutions for RICO and the predicate acts are prosecutions for two separate crimes); *CGC Holding Co. v. Broad & Cassel*, 773 F.3d 1076, 1097 (10th Cir. 2014) (same); *United States v. Wheeler*, 535 F.3d 446, 454 n.3 (6th Cir. 2008) (same). Indeed, it is impossible to reconcile the Second Circuit's holding—that RICO's predicates with express extraterritorial reach are part and parcel of RICO—with the longstanding jurisprudence finding that RICO is silent on its extraterritorial application. *See, e.g.*, *Chao Fan Xu*, 706 F.3d at 974 ("RICO is silent as to its extraterritorial application. . . . Other Courts that have addressed the issue have *uniformly* held that RICO does not apply extraterritorially." (emphasis added)); *see also Norex*, 631 F.3d at 32; *Al-Turki*, 100 F.3d at 1051.

Third and finally, this Court's decision in *Kiobel* further supports rejecting the approach taken by the Second Circuit. In *Kiobel*, this Court considered the extraterritorial reach of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350 (2012), which, like Section 1964(c), authorizes a plaintiff to bring a civil action for a violation of a substantive legal norm that is

incorporated by reference. The ATS provides, in pertinent part, that United States courts "shall have original jurisdiction of any civil action . . . for a tort only, committed in violation of the law of nations." *Id.* Even though the ATS unquestionably authorizes claims substantively grounded in the law of nations (which obviously applies outside of the United States),[6] this Court nevertheless ruled that the ATS *itself* lacked extraterritorial reach. *Kiobel*, 133 S. Ct. at 1669. The Court concluded that the ATS could be invoked in U.S. courts only when there was sufficient nexus with the United States. *Id.* Similarly, here, while Section 1964(c) creates a private right of action to assert claims based on the violation of laws that are incorporated by reference, including those with extraterritorial reach, it does so if, and only if, there is a sufficient U.S. nexus—to wit, where the injury at issue occurred *in the United States*. *See id.* at 1667-69.

D. RICO's Extraterritorial Predicates Do Not Rebut The Presumption That A Claim Under Section 1964(c) Requires A Showing Of A Domestic Injury

The Second Circuit cited money laundering and terrorism-related RICO predicates that have extraterritorial reach to support its conclusion that RICO itself applies extraterritorially, such that a private plaintiff may pursue civil RICO claims based on injuries sustained abroad. Pet. App. 17a-18a.

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[6] And, indeed, piracy, which is one of the prototypical violations of the law of nations that is actionable under the ATS, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004), "typically" occurs on the high seas and so is "beyond the territorial jurisdiction of the United States." *Kiobel*, 133 S. Ct. at 1667.

But Section 1956, which criminalizes money laundering, does not—itself—afford any private right of action at all. *See* 18 U.S.C. § 1956. And nothing in Section 1956(f)'s legislative history suggests that in passing a statute criminalizing money laundering, Congress intended to create a private right of action—whether under Section 1956 or as part of a RICO claim. *See Schwartz v. F.S.&O. Assocs., Inc.*, No. 90 CIV. 1606 (VLB), 1991 WL 208056, at *2 (S.D.N.Y. Sept. 27, 1991) ("[T]here is no indication in the sparse legislative history [of Section 1956] that Congress intended these statutes to give rise to a private civil remedy. In light of the presumption against implying such remedies from criminal statutes, this is hardly surprising."). Given this Court's repeated admonitions that (i) "private rights of action to enforce federal law must be created by Congress," *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979); and (ii) a statute that provides for some extraterritorial reach must be limited to its "terms," *Morrison*, 561 U.S. at 265, the language of Section 1956, which criminalizes certain extraterritorial conduct but does not provide for a private right of action with respect to such conduct, can hardly support the extension of RICO's private right of action to cases involving extraterritorial injury.

Similarly, RICO's terrorism-related predicates do not support interpreting Section 1964(c) to authorize claims in U.S. courts on the basis of injuries suffered abroad. Respondents contend that the USA PATRIOT Act of 2001 ("Patriot Act"), Pub. L. No. 107-56, 115 Stat. 272, which added certain antiterrorism statutes with extraterritorial reach to the list of RICO predicates, supports interpreting Section 1964(c) to

permit civil RICO claims based on injuries suffered abroad. But the Patriot Act does nothing of the sort. Neither the plain language nor the legislative history of the Patriot Act supports extending RICO's private right of action to injuries suffered outside the United States from a terrorist attack that takes place outside of the United States. On the contrary, the Patriot Act was passed in response to the September 11 attacks, which occurred in New York and Washington D.C., and caused injuries within the United States.

Respondent's terrorism-related argument is particularly untenable because even before the Patriot Act was passed, Congress expressly created a private right of action to sue for injuries sustained as a result of a terrorist attack occurring abroad. Antiterrorism Act of 1990 ("ATA"), 18 U.S.C. §§ 2331-38, 2333 (2012). Like RICO, the ATA provides for treble damages for victims of international acts of terrorism. *Id.* Unlike the Second Circuit's interpretation of RICO, however, the ATA has a clear link to the United States—permitting only U.S. citizens to bring claims under the ATA. *Id.* ("*Any national of the United States* injured . . . by reason of an act of international terrorism . . . may sue . . . ." (emphasis added)). By contrast, under the Second Circuit's ruling here, for example, an Australian citizen with no connection to the United States could sue in the United States to recover damages for injuries suffered in Australia in a terrorist attack that was conceived of, planned, and took place in Australia. This takes RICO too far. Neither the plain language nor legislative history of RICO or the Patriot Act suggests that in making terrorism a RICO predicate, Congress intended for U.S. courts to

become responsible for adjudicating all of the world's civil claims arising out of terrorist acts worldwide. Had Congress intended to deviate so radically from its previous express decision to limit terrorism-related claims under the ATA to those brought by U.S. citizens, one would expect to see some evidence of that intention in either the Patriot Act's language or, at a minimum, in its legislative history. *See Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987) (applying the "dog that didn't bark" cannon to conclude that a statutory amendment having a substantial effect would have been evidenced in congressional discussions and legislative history); *City of Roncho Palos Verdes v. Abrams*, 544 U.S. 113, 132 (2005) (Breyer, J., concurring) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." (internal quotation marks omitted)). No such evidence exists here.

* * *

For the foregoing reasons, this Court should reject the Second Circuit's attempt to bootstrap the extraterritorial reach of RICO's predicates to justify permitting U.S. courts to adjudicate civil RICO claims seeking redress for foreign injuries. Moreover, even if the Court disagrees with all of the arguments above, the Second Circuit's reasoning still cannot overcome the Extraterritoriality Presumption. At the absolute most, the Second Circuit's reasoning suggests a *possibility*—and, *Amicus* submits, an unlikely one—that Congress intended to give RICO's private right of action extraterritorial reach by giving

certain RICO predicate statutes extraterritorial reach. This Court has held repeatedly, however, that a mere possibility that Congress intended for a statute to apply extraterritorially cannot overcome the Extraterritoriality Presumption. *See Morrison*, 561 U.S. at 264; *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 253 (1991).

III. The Second Circuit's Holding Will Unduly Burden U.S. Businesses And Have Other Negative Consequences

If permitted to stand, the Second Circuit's ruling would not only create an end-run around this Court's holdings in *Kiobel* and *Morrison*, but would substantially increase litigation exposure for U.S. companies doing business abroad. Worse still, expanding the civil RICO remedy to encompass claims seeking redress for injuries sustained outside the United States will impose new and substantial burdens on foreign companies investing in the United States. As the International Chamber of Commerce has warned, the extraterritorial application of law "discourages international businesses from engaging in trade and investment." International Chamber of Commerce, *Policy Statement: Extraterritoriality and Business* 2 (2006), http://www.iccwbo.org/Data/Policies/2006/Extraterritoriality-and-business/ ("ICC Report").

A. The Second Circuit's Ruling Creates An End-Run Around *Kiobel* and *Morrison*

One perverse result of the Second Circuit's ruling is that it will likely resuscitate ATS claims that *Kiobel* would have otherwise barred. There is often significant factual overlap between ATS and RICO actions, and before *Kiobel*, litigants and

commentators noted RICO's potential use as a supplement to certain ATS claims. *See, e.g.*, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007) (alleging RICO and ATS claims based on a corporation's sales of military equipment to Israel); *Wiwa v. Royal-Dutch Petroleum Co.*, 226 F.3d 88, 93-94 (2d. Cir. 2000) (alleging both ATS and RICO claims based on companies' alleged role in perpetration of human rights abuses); Eric A. Engle, *Extraterritorial Jurisdiction: Can RICO Protect Human Rights? A Computer Analysis of a Semi-Determinate Legal Question*, 3 J. High Tech. L. 1, 11 (2004) (discussing *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (action by residents of Myanmar under ATS and RICO for human rights violations allegedly committed by Myanmar government and Unocal)).

In particular, given the breadth of terrorism-support and money-laundering statutes, which are RICO predicates with extraterritorial reach, many ATS cases previously dismissed for lack of a sufficient U.S. nexus could now, under the Second Circuit's reasoning, survive as extraterritorial RICO claims. For example, in *Jovic v. L-3 Servs., Inc.*, 69 F. Supp. 3d 750, 753, 756 (N.D. Ill. 2014), plaintiffs brought suit under the ATS alleging, among other things, that an American corporation aided and abetted murder carried out by the Croatian military during the Yugoslavian civil war. The complaint specifically alleged that conduct relevant to the claims, including certain meetings between the defendants and members of the Croatian military, took place in Virginia. *Id.* at 754-55, 759. The District Court dismissed the complaint because the "primary conduct" giving rise to the plaintiffs' claim occured in

Croatia, and thus their claims were barred by the Extraterritoriality Presumption. *Id.* at 759. Similarly, in *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014), the Eleventh Circuit applied *Kiobel* and dismissed, on extraterritoriality grounds, ATS claims alleging that Chiquita Brands acted in concert with Colombian paramilitary forces to commit acts of violence, including murder, in Colombia. *Id.* at 1188-89, 1191. Under the Second Circuit's ruling, however, the same conduct could support a viable claim under RICO if recast as a violation of one of the anti-terrorism predicates to RICO that have extraterritorial reach. *See, e.g.*, 18 U.S.C. § 1961(1)(G) (incorporating as RICO predicates offenses indictable under 18 U.S.C. § 2332b(g)(5)(B) (defining "Federal Crime of Terrorism" to include offenses under 18 U.S.C. § 956(a)(1) (prohibiting any act "outside the United States" that would constitute the offense of murder or kidnapping in the United States))).

Tymoshenko v. Firtash, a case brought by the former prime minister of the Ukraine, also provides a useful illustration. 57 F. Supp. 3d 311 (S.D.N.Y. 2014). In that case, Yulia Tymoshenko alleged that the defendant, Dmytro Firtash, financed the election of Ms. Tymoshenko's political opponent, Viktor Yanukovych, and bribed various Ukranian officials to persecute Ms. Tymoshenko, resulting in her arrest and detention. *Tymoshenko v. Firtash*, No. 11-CV-2794 (KMW), 2013 WL 4564646, at *1 (S.D.N.Y. Aug. 28, 2013). The complaint alleged a violation of the ATS and a violation of RICO based on a pattern of, among other things, money laundering conducted through one of the largest banks in the Ukraine. *Id.* at *5. The district court dismissed the ATS claim

because it constituted an "impermissible extraterritorial application of the ATS." *Id.* at *4. Applying *Norex*, the District Court also dismissed the RICO claim as impermissibly extraterritorial but permitted the plaintiff to replead the RICO claim. *Id.* at *5. The district court later dismissed the second amended complaint but granted leave to replead, noting that under the Second Circuit's decision in this case, the plaintiffs may have been able to allege a viable RICO claim based on allegations that the defendants engaged in money laundering, a predicate act with extraterritorial reach. *Tymoshenko*, 57 F. Supp. 3d at 324-25.

Thus, one of the unintended consequences of the Second Circuit's decision is that claims found to be impermissibly extraterritorial, when brought under the ATS, may now be brought as civil RICO claims. And such claims may well capture extraterritorial conduct that would not have been actionable under the ATS. Indeed, while this Court has instructed that the ATS be applied in limited circumstances, *Sosa*, 542 U.S. at 720, courts have tended to interpret RICO broadly, *Sedima*, 473 U.S. at 497. To permit the Second Circuit's decision to stand would invite precisely the negative consequences that *Kiobel* was designed to avoid.

Similarly, the Second Circuit's decision creates at least a partial exception to *Morrison's* holding that Section 10(b) claims can be brought only in connection with domestic securities transactions. 561 U.S. at 267. After *Morrison*, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. 111-203, 124 Stat. 1376 (2010), which reversed *Morrison*'s holding, but only with respect to claims brought by the

Department of Justice and the Securities and Exchange Commission. *See* 15 U.S.C. § 78aa(b); *SEC v. Tourre*, No. 10 Civ. 3229(KBF), 2013 WL 2407172, at *1 n.4 (S.D.N.Y. June 4, 2013) ("[T]he Dodd-Frank Act effectively reversed *Morrison* in the context of . . . enforcement actions."). However, Congress expressly refused to overrule *Morrison*'s holding with respect to private actions, opting instead to study the issue further. *See* Dodd-Frank § 929(Y). Accordingly, in the wake of *Morrison* and Dodd-Frank, the government may bring securities-fraud actions based on securities transactions that occur outside the United States, but private plaintiffs may not.

The Second Circuit's decision, if permitted to stand, will create a partial end-run around *Morrison* and Congress's finely-tuned decision to permit only some kinds of securities-fraud cases to be brought in U.S. courts. The civil RICO statute expressly provides that when the government obtains a criminal conviction for fraud in connection with the purchase or sale of a security, the conduct underlying the fraud may then be used as the basis for a civil RICO claim. *See* 18 U.S.C. § 1964(c). Against this background, the Second Circuit's ruling would permit a private plaintiff to assert a RICO claim based on a foreign securities transaction—even though a private securities-fraud claim based on the same transaction would be barred by *Morrison*. And, as a bonus, the plaintiff would be able to recover three times the damages incurred—a remedy not available for securities fraud.

In sum, under the Second Circuit's decision, extraterritorial private claims—which this Court has found unfit for adjudication in the United States—will be permitted to proceed so long as they are

repackaged as a different cause of action. *Amicus* respectfully submits that this Court should not sustain such a broad interpretation of RICO's private right of action and should, instead, limit the private right of action to claims brought to obtain redress for injury suffered in the United States.

B. Permitting Civil RICO To Reach Claims Based On Foreign Injuries Poses Significant Risks To U.S. Businesses Doing Business Abroad And To Foreign Businesses Investing In The United States

If permitted to stand, the Second Circuit's ruling will impose substantial burdens on U.S. companies doing business abroad and on foreign businesses that invest in the United States. The Second Circuit's ruling not only opens the door to claims of the kind that this Court previously rejected in *Morrison* and *Kiobel*; it goes much further. RICO's breadth, both in terms of the sheer number of predicate offenses and the broad range of RICO's conspiracy provisions, means that under the Second Circuit's ruling, many claims with little if any connection to the United States may now be brought in U.S. courts. This exacerbates the problem identified by this Court in *Morrison* and *Kiobel*, because civil RICO—"the litigation equivalent of a thermonuclear device," *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991)—offers private plaintiffs the staggering benefit of treble damages and attorneys' fees.

This is not a theoretical risk. Since the Second Circuit erased decades of precedent and concluded that RICO could have extraterritorial reach, courts have refused to dismiss RICO claims based on

everything from political oppression in the Ukraine, *see Tymoshenko*, 57 F. Supp. 3d at 324-25, to a European money-laundering scheme resulting in damage to Swiss nationals, *see Ixotic AG v. Kammer*, 09-CV-4345 (NG) (JO), 2014 U.S. Dist. LEXIS 180782, at *30-32 (E.D.N.Y. Sept. 30, 2014) ("At an earlier point in the proceedings, I expressed . . . concern that the RICO claims were defective because they impermissibly sought to apply the RICO Act extraterritorially. . . . Given the [*European Community* Panel's] focus on the racketeering acts rather than on the enterprise as such, I conclude that the plaintiffs have asserted RICO claims that are not impermissibly extraterritorial.").

These decisions represent a material shift in how civil RICO claims are treated by U.S. courts. Before the Second Circuit's ruling, courts routinely dismissed similar RICO claims. *See Adhikari v. Daoud & Partners*, 09-cv-1237, 2013 U.S. Dist. LEXIS 189601, at *22-26 (S.D. Tex. Aug. 23, 2013) (dismissing RICO claims stemming from a Jordanian entity's Middle East racketeering, which allegedly injured citizens of Nepal); *Republic of Iraq v. ABB AG*, 920 F. Supp. 2d 517, 542-46 (S.D.N.Y. 2013) (dismissing a RICO claim arising from a money-laundering scheme conducted in connection with the Oil-for-Food Program, which allegedly harmed the Republic of Iraq); *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 167-68 (D.D.C. 2013) (dismissing RICO claims revolving around an extortion and money-laundering operation conducted in Kazakhstan, which allegedly caused harm there). As Judge Cabranes noted, after the Panel's decision, these claims would likely be "welcome[]" in "federal court." Pet. App. 72a n.8 (Cabranes, J., dissenting).

Moreover, the risk that civil RICO claims seeking redress for foreign injuries will proliferate is particularly troublesome because anything from product liability, *see In re Toyota Motor Corp.*, 785 F. Supp. 2d 883 (C.D. Cal. 2011), to antitrust claims, *see In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666 (S.D.N.Y. 2013), to false advertising claims, *see* Complaint, *Bagert v. Volkswagen Grp. of Am., Inc.*, No. 2:15-cv-07174-JLL-JAD (D.N.J. Sept. 29, 2015), ECF. No. 1, can be framed as civil RICO claims. That only some RICO predicates have extraterritorial reach offers little relief. Ordinary business disputes can be—and when they arise in developing countries, frequently are—repackaged as claims of money laundering, a RICO predicate with extraterritorial application. *See, e.g. Hourani*, 943 F. Supp. 2d at 162-63, 167; *Iraq*, 920 F. Supp. 2d at 543; *Tymoshenko*, 2013 WL 4564646, at *1.

RICO's broad scope and the oft-noted abuse associated with a statute that authorizes treble damages and attorneys' fees only underscores the danger created by the Second Circuit's decision. *DelRio-Mocci v. Connolly Props.*, 672 F.3d 241, 254 (3d Cir. 2012) ("In the criminal arena, this proclivity for abuse is at least limited by prosecutorial discretion, the risk of losing credibility with jurors if the prosecution engages in 'overkill' or overreaching, and the related risk of jury nullification. However, RICO's civil remedy is not restricted by any such considerations. Thus, it is not surprising that we are today faced with a claim that this landlord-tenant dispute is really a racketeering conspiracy that should entitle this tenant to treble damages under RICO."); *Fleet Credit Corp. v. Sion*, 699 F. Supp. 368,

377 (D.R.I. 1988), *rev'd on other grounds*, 893 F.2d 441 (1st 1990) ("[O]verbreadth is limited through prosecutorial discretion in [RICO] cases brought by the government, but in private actions a proper construction of the pattern requirement is all that constrains plaintiffs to obey Congressional intent."); *Lopez v. Dean Witter Reynolds, Inc.*, 591 F. Supp. 581, 588 (N.D. Cal. 1984) ("It is incumbent upon courts, especially in civil RICO actions where the restraint of prosecutorial discretion is not present, to scrutinize claims to insure that the statute is not applied to contexts outside those intended by Congress."); *DLJ Mortg. Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225, 236 (E.D.N.Y. 2010) ("[P]laintiffs have often been overzealous in pursuing RICO claims, flooding federal courts by dressing up run-of-the-mill fraud claims as RICO violations. In consequence, courts must 'strive to flush out frivolous RICO allegations at an early stage of the litigation.'").[7] The abuse endemic in civil RICO litigation only highlights the risk posed by the Second Circuit's decision, both to U.S. companies doing business abroad and to foreign businesses investing in the United States.

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[7] Even more troubling, the Panel's reasoning has been used not only to extend the reach of civil RICO; it has also been used to extend the reach of other federal statutes that refer to criminal predicates with some extraterritorial application, such as Section 924(c) of the Firearms Act, 18 U.S.C. §§ 921-31, *see United States v. Ahmed*, 94 F. Supp. 3d 394, 413 (E.D.N.Y. 2015) (based on the Panel's ruling, "[n]either *Morrison* nor *Kiobel* requires Congress to employ some talismanic language to rebut the presumption against extraterritoriality. Rather, the Court may look to the structure of the statute and with it, its incorporated predicate statutes, to determine whether the presumption against extraterritoriality has been rebutted.").

1. The Potential For Extraterritorial Civil RICO Enforcement Places Significant Burdens On NFTC's Members

Permitting U.S. courts to adjudicate claims based on foreign conduct and seeking redress for foreign injury will impose substantial burdens on NFTC's members. As noted above, conduct that is legal in foreign jurisdictions may now not only be subject to suit in the United States, but may result in U.S. businesses' facing class actions seeking triple recoveries under civil RICO. The problem is particularly acute for financial institutions and companies doing business in developing countries, where garden-variety business disputes often involve allegations of money laundering, a RICO predicate with extraterritorial reach.

Moreover, litigating cases involving foreign plaintiffs and foreign injuries imposes unique burdens on American businesses. Obtaining discovery from foreign sources is invariably expensive, cumbersome, and difficult, and almost always results in a dramatic increase in the cost of litigation. Courts have acknowledged as much, observing that foreign discovery imposes "financial hardships" and "significant delays" on parties and on the courts. *Turedi v. Coca Cola Co.*, 460 F. Supp. 2d 507, 526 (S.D.N.Y. 2006), *aff'd*, 343 F. App'x 623 (2d Cir. 2009). And the high cost posed by international discovery and the potential for treble damages ensures that once a case passes the motion-to-dismiss stage, companies will be under tremendous pressure to settle—even if the case lacks any merit. In this way, civil RICO litigation "presents a danger of vexatiousness different in degree and in kind from

that which accompanies litigation in general." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975). Faced with an ever-present risk that their legitimate business dealings in foreign countries will result in U.S. litigation, many companies may opt to disengage from developing countries—yielding those business opportunities to their foreign competitors and undermining their competitive position.

2. The Potential Of Extraterritorial Civil RICO Enforcement Presents Extraordinary Risks For Foreign Corporations Considering Investment In The United States

Permitting civil RICO claims based on foreign injury will also deter foreign investment in the United States. Foreign direct investment is vital to the U.S. economy: it creates jobs for Americans, and increases the availability, and decreases the cost, of capital. But the increased exposure to litigation risk caused by the extraterritorial application of U.S. law discourages foreign investment because corporations are reluctant to place themselves within the jurisdiction of U.S. courts. *See* ICC Report at 2.

Indeed, as *Amicus* can attest, and as American policy-makers and scholarly studies have repeatedly confirmed, potential U.S. class-action litigation is high among the concerns of would-be investors in the United States. *See* Sen. Jon Kyl, *A Rare Chance to Lower Litigation Costs: A Federal Committee Wants to Hear Your Ideas On the Subject. Speak Up.*, WALL STREET J., (Jan. 20, 2014, 6:21 PM) http://www.wsj.com/articles/SB10001424052702304049704579321003417505882 ("[E]xcessive litigation costs . . . make foreign companies reluctant to invest

here."); Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty*, Internatinal Trade Administration, 2 (Oct. 2008), http://trade.gov/investamerica/Litigation_FDI.pdf ("Fear of litigation and potential liability under the U.S. legal system are among the more important concerns to those interested in investing in the United Sates."); *Excessive Litigation's Impact on America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong. 11 (2013) (Statement of Paul J. Hinton, NERA Economic Consulting) ("Many foreign companies are wary of becoming embroiled in U.S. litigation, which may deter foreign direct investment."); Michael R. Bloomberg & Senator Charles E. Schumer, *Sustaining New York's and the US' Global Financial Services Leadership* ii, 16, (2007) http://www.nyc.gov/html/om/pdf/ny_report_final.pdf; *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (class actions, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law"). Under the Second Circuit's holding, foreign citizens are now able to come into U.S. courts to seek redress for foreign injuries, even when no such cause of action is available in their home jurisdictions. *Cf. Empagran*, 542 U.S. at 167 ("[T]o apply our remedies would unjustifiably permit [foreign] citizens to bypass their [countries'] own less generous remedial schemes.").

This case illustrates the litigation abuse that businesses with contacts in the United States, which

are subject to the jurisdiction of U.S. courts, will now be forced to confront. The European Commission, and those of its member states that have joined this action, have declined to enact legislation of the kind at issue here. Even though the alleged misconduct took place in Europe, Respondents are apparently unable, or unwilling, to litigate their claims in any European jurisdiction and so bring their claims in the United States.[8] That alone points to a deep conflict between the laws of this country and those of Respondents' home jurisdictions. Indeed, noting that many European countries have made different regulatory and policy choices from the United States, many of the Respondents here have previously objected to the extraterritorial application of U.S. law. *See, e.g.*, Brief for the Federal Republic of Germany as *Amicus Curiae* in Support of Respondents at 1, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491) ("The Federal Republic of Germany has consistently maintained its opposition to overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged foreign activities that caused injury on foreign soil."); Brief for the Republic of France as *Amicus Curiae* in Support of Respondents at 1-3, *Morrison*, 561 U.S. 247 (No. 08-1191); Brief of the Federal Republic of Germany as *Amicus Curiae* in Support of Petition for a Writ of Certiorari at 1-2, *Empagran*, 542 U.S. 155 (No. 03-724).

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[8] While in this case, the European Commission seeks to invoke the statute for conduct that occurred abroad, any victory would be "pyrrhic," because "its citizens . . . are among the likely targets of future RICO actions under the panel's interpretation of the statute." Pet. App. 70a (Cabranes, J., dissenting).

This Court has worried about the potential for U.S. laws with extraterritorial reach to discourage foreign investment. That concern—previously expressed in connection with antitrust and securities laws, and in connection with the ATS—is particularly pronounced in the case of civil RICO claims because of the type of liability at issue, which contemplates not only class actions, but also class actions seeking treble damages. The courts of this country simply cannot, and should not, become the forum to ventilate the whole world's complaints, much less the complaints of foreign sovereigns that have elected not to enact similarly sweeping legislation at home.

CONCLUSION

For the foregoing reasons, and those in the Petitioners' brief, the Court should reverse the decision below.

Respectfully submitted,

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No. 15-138

IN THE

Supreme Court of the United States

RJR NABISCO, INC., *et al.*,

Petitioners,

v.

THE EUROPEAN COMMUNITY, acting on its own behalf and on behalf of the Member States it has power to represent, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, or to what extent, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, applies extraterritorially.

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INTERESTS OF *AMICI CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears in this Court as *amicus curiae* to defend the presumption that, absent clear congressional intent to the contrary, acts of Congress do not provide a remedy for alleged misconduct occurring outside the United States. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Morrison v. Nat'l Australian Bank Ltd.*, 561 U.S. 247 (2010). In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles on the proper scope of civil actions under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* (RICO). *See, e.g.*, Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006).

Allied Educational Foundation (AEF) is a nonprofit charitable foundation based in Tenafly,

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[1] Pursuant to Supreme Court Rule 37(6), *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and stipulations of consent have been lodged with the Court.

New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici have long been concerned that the reflexive invocation of RICO by civil litigants engaged in garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens the federal judiciary. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now frequently invoked in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). Among the many abusive attempts to drastically expand RICO's reach, none are more problematic than recent civil suits brought by foreign governments against American businesses for overseas conduct.

Amici agree with petitioners that there is no statutory basis for inferring that Congress enacted RICO with the expansive, extraterritorial scope attributed to it by the panel below. We write separately to address the significant harm that will result for our civil justice system if this Court were to affirm the Second Circuit's untethered expansion of RICO's substantive scope in this case. For the reasons that follow, *amici* join with petitioners in urging the Court to vacate the erroneous holding below.

STATEMENT OF THE CASE

Petitioners are RJR Nabisco, Inc. and several related entities. Respondents are the European Community and its 26 member states.[2] Respondents sued petitioners under RICO, alleging that petitioners conspired with cigarette wholesalers in such far-flung countries as Colombia and Croatia, among other places, to launder monies derived from the sale of illegal narcotics in Europe. Pet. App. 2a-3a. The complaint alleges that, in furtherance of this global conspiracy, petitioners engaged in various predicate racketeering acts in violation of RICO, including mail fraud, wire fraud, and money laundering. *Id.* at 3a-5a. As a result of these alleged RICO violations, respondents claim myriad injuries to European governments and their economies in the form of lost tax revenues, higher law-enforcement costs, and reduced profits to their state-owned tobacco businesses. *Id.* at 211a-228a.

The United States District Court for the Eastern District of New York dismissed respondents' RICO claims. Applying this Court's holding in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010), the district court found that because the RICO statute is "silent as to any extraterritorial application," it "has none." Pet. App. 44a. And because the enterprise alleged in the complaint consisted of "a loose association of Colombian and Russian drug-dealing organizations and European

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[2] Since this lawsuit was originally filed, the European Community has been incorporated into the European Union. *See European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 148 (2d Cir. 2014).

money brokers whose activity was directed outside the United States," the complaint failed to state an actionable claim under RICO. *Id.* at 5a.

On appeal, the U.S. Court of Appeals for the Second Circuit reversed, expressly holding that RICO applies extraterritorially. The appeals court rejected the district court's conclusion that RICO cannot apply to extraterritorial conduct because "with respect to a number of offenses that constitute predicates for RICO liability ... Congress has clearly manifested an intent that they apply extraterritorially." Pet. App 3a. The panel also fully extended RICO to foreign enterprises, reasoning without any statutory basis that this Court's presumption against extraterritorial application of U.S. laws "does not command giving foreigners carte blanche to violate the laws of the United States." *Id.* at 14a. As to several of the alleged RICO predicates (including mail and wire fraud), the appeals court acknowledged that those statutes do not apply extraterritorially but nevertheless held that the complaint alleged sufficient domestic activity to come within RICO's ambit. *Id.* at 18a-24a.

Petitioners sought rehearing on the basis that, regardless of the geographic scope of the alleged RICO enterprise or any underlying predicate acts, 18 U.S.C. § 1964(c) requires a domestic *injury* before a plaintiff is entitled to treble damages. Pet. App. 55a-58a. In response, the panel issued a second opinion extending § 1964(c) to extraterritorial injuries as well. Reasoning that this Court's presumption against extraterritoriality is "primarily concerned with the question of what *conduct* falls within a statute's purview," the panel held that such a

presumption does not apply to the question of extraterritorial injury caused by violations of RICO. *Id.* at 58a.

Petitioners sought rehearing en banc, which was denied by an 8-5 vote. Judge Jacobs, writing for all five dissenters, insisted that further review was needed in light of the "frequency of RICO litigation" in the Second Circuit and the "tension" between the panel opinion and prior precedent, including *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010) (per curiam) (holding that because "RICO is silent as to any extraterritorial application ... it has none"). Pet. App. 68a-69a.

Judge Cabranes, joined by Judges Jacobs, Raggi, and Livingston, lamented that "a panel of our court has discovered and announced a new, and potentially far-reaching, judicial interpretation of the statute—one that finds little support in [the] history of the statute, its implementation, or the precedents of the Supreme Court." Pet. App. 73a.

Writing for the same four judges, Judge Raggi criticized the panel opinion for creating a circuit split and failing to follow this Court's approach to extraterritorial analysis in *Morrison*. She urged further review not only to decide whether "RICO applies extraterritorially" but in order to establish "criteria for determining whether a RICO claim is domestic or extraterritorial." Pet. App. 77a.

SUMMARY OF ARGUMENT

Although a straightforward application of this Court's precedents clearly dictates that RICO does not apply extraterritorially, the Second Circuit's decision below exacerbates an existing circuit split by extending RICO to cover foreign racketeering, foreign enterprises, *and* foreign injuries. As the petitioners' brief ably demonstrates, absent clear contrary evidence, statutes apply only domestically, not extraterritorially, and nothing in RICO rebuts this Court's longstanding presumption that Congress regulates with only domestic concerns in mind.

Even when cabined to wholly domestic matters, civil RICO is uniquely prone to abuse. RICO is notorious for its elasticity and for enabling plaintiffs to convert ordinary civil disputes into federal racketeering claims. And RICO provides treble damages and recovery of all costs, including attorney fees, to prevailing plaintiffs. Armed with the loss of goodwill and reputation that often follow the news that a defendant company has been accused of "racketeering" activity, civil RICO plaintiffs can extract settlements for even the most frivolous claims.

Giving extraterritorial effect to a statute with the unparalleled breadth and remedies of RICO will only make matters worse. Affirming the decision below unquestionably will invite wholly foreign litigation into the United States, where it does not belong. Allowing foreign litigants to bring what are otherwise ordinary foreign civil disputes into U.S. federal courts will dramatically increase the burden on the federal courts, impose higher litigation costs

on multi-national businesses, force defendants into coercive settlements, and hence work injustice.

Moreover, any contention by the Government that RICO's substantive prohibitions can have two different meanings—an extraterritorial reading in criminal cases, and a purely domestic one in civil cases—is simply wrong. In arguing that RICO simultaneously enjoys two authoritative constructions, the Government has gone so far as to suggest that criminal statutes enjoy a presumption *in favor of* extraterritoriality. Not so. As this Court has emphasized, the presumption against extraterritoriality "applies ... in *all* cases." *Morrison*, 561 U.S. at 261 (emphasis added). And when a single statute has both criminal and civil applications, the Court has repeatedly held that "we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004).

Reversing the panel's expansive holding below is especially crucial in light of this Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, as activist plaintiffs are strategically pivoting to civil RICO as a surrogate for claims that are now foreclosed under the Alien Tort Statute. If this Court were to affirm the Second Circuit's deeply flawed decision below, it would effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. Permitting the use of civil RICO as a substitute for ATS litigation would saddle U.S. multi-national companies with paralyzing risks of liability absent any Congressional mandate to do so.

ARGUMENT

I. THE GLOBAL EXPANSION OF RICO INVITES AN EXPLOSION IN CIVIL LITIGATION ABUSE

A. Civil RICO Is Uniquely Prone to Abuse by the Plaintiffs' Bar

Although RICO was adopted as a new law enforcement tool for combating organized crime, the civil RICO provision, 18 U.S.C. § 1964(c), has rarely been used for that purpose. Instead, the ever-increasing number of civil RICO suits filed each year primarily target legitimate, everyday business activity that would not fit most people's definition of racketeering. And because RICO is drafted so broadly, plaintiffs' attorneys can file as RICO claims a growing number of disputes that Congress never could have foreseen. "Through innovative lawyering, civil RICO claims have centered on a myriad of subjects, including sexual harassment, the 1986 air strike on Libya, mismanagement of hazardous waste sites, anti-abortion protest activities, a parishioner's grievances against her former church, a strict products liability suit involving defective infant formula, and a wrongful discharge action." Petra J. Rodrigues, *The Civil RICO Racket: Fighting Back with Federal Rule of Procedure 11*, 64 ST. JOHN'S L. REV. 931, 936-37 (1990).

Because the "danger of vexatiousness" is especially strong in RICO cases, *Int'l Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 153 (4th Cir. 1987), the statute has become a highly profitable vehicle for the plaintiffs' bar. As a result, judges and legal scholars

have routinely criticized the overly expansive reach of civil RICO, which provides "many ordinary civil cases with an entrée to federal court." Anne B. Poulin, *RICO: Something for Everyone*, 35 VILL. L. REV. 853, 857 (1990); *see Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 471-72 (2006) (Thomas, J., dissenting) ("Judicial sentiment that civil RICO's evolution is undesirable is widespread."); William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 13 (1989) (inviting "amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court").

The attractiveness of civil RICO for plaintiffs and the plaintiffs' bar is not difficult to understand. RICO applies not only to individual actors, but also to corporations, and it promises treble damages and recovery of costs, including attorney fees, to prevailing plaintiffs. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 504 (1985) (Marshall, J., dissenting) ("RICO is out of control not only because it is so easy to claim grounds for a suit, but because the appeal of treble damages plus legal fees has proved irresistible for plaintiffs and their lawyers."). And RICO's liberal venue provisions, which allow suit to be brought in any district where the defendant "resides, is found, has an agent, or transacts his affairs," 18 U.S.C. § 1965(a), invite forum shopping by RICO plaintiffs.

Moreover, plaintiffs can always threaten to use the provocative public-relations implications of RICO's title to coerce settlements from companies that understandably fear the loss of goodwill and reputation that would accompany news of the

company's being accused of "racketeering" activity. "Once a clever lawyer can characterize an opponent's actions as constituting one or two of the myriad of predicate acts, it takes little imagination to deem those actions RICO violations." Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 626 (1990).

Statistical studies suggest that plaintiffs are filing RICO lawsuits based on alleged "racketeering" conduct that federal prosecutors see no reason to pursue. "Between 2001 and 2006, there was an average of 759 civil RICO claims filed per year, while in those same years, a paltry average of 212 criminal RICO cases were referred to the United States Attorney's Office." Nicholas L. Nybo, *A Three-Ring Circus: The Exploitation of Civil RICO, How Treble Damages Caused It, and Whether Rule 11 Can Remedy the Abuse*, 18 ROGER WILLIAMS U. L. REV. 19, 24 (2013). Similarly, a 2002 study found that, of all RICO cases decided by federal appellate courts between 1999 and 2001, 78% were civil and only 22% were criminal. Pamela H. Busy, *Private Justice*, 76 S. CAL. L. REV. 1, 22 & n.111 (2002). Even when confined to its proper domestic sphere, civil RICO is uniquely prone to abuse.

B. Extraterritorial Application of RICO Will Only Invite Further Abuse

Unless this Court reverses the aberrant holding below, frivolous RICO claims will proliferate even more. While civil actions under RICO have always been a lightning rod for criticism, extending

RICO to cover allegations of foreign racketeering, foreign enterprises, and foreign injuries, as the Second Circuit has now done, further exacerbates the problem. The unusual breadth of RICO—and the mischief that will surely accompany its extension into wholly foreign disputes—offer the Court an independent basis for overturning the panel decision below.

Among the many creative attempts to expand the law's reach, none are more unfounded than recent civil RICO suits brought by foreign governments against American businesses for alleged "racketeering" activities overseas. *See* Ignacio Sanchez & Kevin O'Scannlain, *Foreign Governments' Misuse of Federal RICO: The Case for Reform*, WASHINGTON LEGAL FOUNDATION WORKING PAPER (May 2006) ("[T]he clearest and most egregious misuse and abuse of civil RICO to date is a growing species of litigation brought not by the United States, but by *foreign* governments.").[3] Such use of RICO exceeds even the reach of the statute's overly expansive language.

These disputes are best adjudicated in the courts of the countries that bring them. Nonetheless, opportunistic plaintiffs have sought to extract the settlement of frivolous claims from American companies unwilling to cope with the threat of treble damages and the unfavorable publicity that arises whenever one is labeled a "racketeer." These plaintiffs carefully tailor their

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[3] Available at http://www.wlf.org/publishing/publication_detail.asp?id=1767.

complaints to meet the statutory requirements of a RICO lawsuit:

> These claims are often constructed by piggy-backing on legitimate U.S. criminal investigations of the criminal racketeers. The lawyers convert the government's evidence (usually after extensive investigation and discovery), discard the foreign criminal racketeers and *replace* them with the deep pockets whose products were used illegally by the criminals. The legitimate business entity is thereby bootstrapped into alleged "schemes." The criminal actors go unnamed in these suits, revealing their true purpose as nothing more than an attempt to wrest vast sums from corporations with extensive financial resources.

Sanchez & O'Scannlain, *supra*, at 3.

If this Court were to make an exception to the presumption against extraterritoriality in this case, foreign governments and their political subdivisions would undoubtedly view that decision as a free-standing invitation to bring RICO suits against U.S. multi-national companies in federal district courts throughout the country. And one can easily imagine the onslaught of similar RICO cases that would be brought by foreign agencies, municipalities, and business competitors against U.S. companies in the wake of such a ruling. Individual foreign plaintiffs, too, will surely take advantage of RICO's unusual breadth to refashion foreign-law claims as civil RICO

claims. The availability of extraordinary treble damages and attorney fees under RICO would dramatically increase the settlement value of otherwise ordinary claims. In addition, easy access to federal courts would provide foreign plaintiffs with American procedural advantages (*e.g.*, discovery, class actions, jury trials, and contingent-fee arrangements with counsel) that are simply unavailable in most foreign jurisdictions.

Because RICO has been so broadly interpreted, companies—both domestic and international—desperately need a clear, bright-line rule as to when their entirely overseas conduct may be deemed subject to treble-damages liability in the United States. As this Court has emphasized, "[s]imple jurisdictional rules ... promote greater predictability. Predictability is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). When properly applied and enforced, the venerable presumption against extraterritoriality affords the business community with that much-needed clarity and is consistent with this Court's precedents.

WLF does not mean to suggest that the Court ought to read RICO in a crabbed manner for the purpose of restricting the reach of the admittedly overbroad statute. To the contrary, WLF recognizes that it is not this Court's role to rewrite RICO, and that any *statutory* deficiencies are best addressed by Congress. *Sedima*, 473 U.S. at 500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because the plaintiffs are not taking advantage of it in its more

difficult applications."). Nonetheless, jettisoning the traditional presumption against extraterritoriality (as the Second Circuit effectively did here) would so dramatically expand RICO that the Court should, as petitioners urge, vacate the decision below and remand with instructions to affirm the district court's dismissal of the RICO claims in their entirety.

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY GOVERNS § 1962 OF RICO IN BOTH CIVIL AND CRIMINAL CASES

Although *amici* do not yet have the benefit of the Government's *amicus curiae* brief in this case, we anticipate that the United States will articulate a view substantially similar to that advanced in its *amicus curiae* brief in *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010). In that case, after the Second Circuit held that civil RICO had no extraterritorial application, the United States took the somewhat unusual step of requesting a limited hearing en banc so the court could clarify that its decision did *not* apply with equal force to RICO prosecutions by the Government. *See* Brief of the United States as *Amicus Curiae* in Support of Limited Rehearing En Banc, *Norex Petroleum Ltd. v. Access Indus., Inc.*, No. 07-4553-cv (2d Cir. Nov. 22, 2010) (hereinafter, U.S. *Norex* Br.) ("The government has a strong interest in ensuring that RICO remains available to prosecute and otherwise prevent and restrain extraterritorial offenses.").

In response, the Second Circuit panel amended its opinion to include the following

clarification: "Because Norex brought a private lawsuit pursuant to 18 U.S.C. § 1964(c), we have no occasion to address—and express no opinion on—the extraterritorial application of RICO when enforced by the government." *Norex Petroleum*, 631 F.3d at 33. *Amici* agree with that clarification to the extent that it imposes a domestic injury requirement under civil RICO, 18 U.S.C. § 1964(c), but reject any suggestion that RICO's substantive prohibitions, 18 U.S.C. § 1962, can mean one thing in a civil context and another in a criminal one.

Nonetheless, asserting that § 1962 has two different meanings—an extraterritorial reading that applies for actions brought by the Government, and a purely domestic one that applies in private, civil actions—the United States has gone so far as to suggest that criminal statutes "enjoy a presumption *in favor of* extraterritoriality." U.S. *Norex* Br. at 1, 3. Indeed, even after this Court's unanimous decision in *Morrison*, the Government has persisted in claiming that the presumption against extraterritoriality does not apply to criminal charges brought under § 10(b) of the Securities Exchange Act of 1934—the very statute at issue in *Morrison*. *See* Brief for the United States of America, *United States v. Vilar*, No. 10-521(L), at 96-101 (2d Cir. Apr. 18, 2012). As demonstrated below, the Government's position simply has no basis in the law.

A. This Court's Presumption Against Extraterritoriality Applies Fully to Criminal Statutes

Contrary to the Government's contention that RICO's substantive prohibitions apply extra-

territorially for the United States but domestically for everyone else, no basis exists in the law for such a distinction. Rather, as this Court emphasized in *Morrison*, judges must "apply the presumption [against extraterritoriality] in *all cases*, preserving a stable background against which Congress can legislate with predictable effects." 561 U.S. at 261 (emphasis added). And nothing in *Morrison* suggests that the ordinary assumption that Congress "is primarily concerned with domestic conditions," *id.* at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)), should not apply to statutory violations imposing both civil and criminal liability.

Any suggestion to the contrary departs sharply from nearly 200 years of precedent. This Court first applied the presumption against extraterritoriality to the Government in a criminal prosecution in *United States v. Palmer*, 16 U.S. 610 (1818), which held that the anti-piracy provisions of the Crimes Act of 1790 did not reach conduct committed by foreigners aboard foreign vessels on the high seas. Although acknowledging that the statute's words, "any person or persons," were broad enough to include "every human being," Chief Justice Marshall (writing for the Court) nonetheless held that such broad statutory language must "be limited to cases within the jurisdiction of the state." 16 U.S. at 631.

Since *Palmer*, this Court has consistently adopted the venerable presumption against extraterritoriality in criminal cases. *See, e.g., Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) ("[W]e presume, absent a clear statement from Congress, that federal statutes do not apply outside the United

States."); *Small v. United States*, 544 U.S. 385, 388 (2005) (applying the "commonsense notion that Congress generally legislates with domestic concerns in mind"); *United States v. Flores*, 289 U.S. 137, 155 (1933) (Stone, J.) ("[T]he criminal jurisdiction of the United States is in general based on the territorial principle, and criminal statutes of the United States are not by implication given an extraterritorial effect."); *Blackmer v. United States*, 284 U.S. 421, 437 (1932) (Hughes, C.J.) ("[L]egislation of the Congress, unless the contrary intent appears, is construed to apply only within the territorial jurisdiction of the United States."); *United States v. Bowman*, 260 U.S. 94, 98 (1922) (Taft. C.J.) ("If punishment is to be extended to include those [frauds] committed outside the strict territorial jurisdiction, it is natural for Congress to say so in the statute, and failure to do so will negative the purpose of Congress in this regard.").[4]

As these cases demonstrate, "[a] statute either applies extraterritorially or it does not, and once it is determined that a statute does not apply extraterritorially, the only question we must answer in the individual case is whether the relevant conduct occurred in the territory of a foreign sovereign." *United States v. Vilar*, 729 F.3d 62, 74

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[4] The federal courts of appeals have followed suit. *See, e.g., United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012) ("Whether Congress has exercised that authority is a matter of statutory construction and, generally, statutes enacted by Congress, including criminal statutes, apply only within the territorial jurisdiction of the United States."); *United States v. Gatlin*, 216 F.3d 207, 214-15 (2d Cir. 2000) (reversing defendant's criminal conviction absent "clear congressional intent to apply [the] statute extraterritorially").

(2013). Accordingly, "the distinction the government attempts to draw between civil and criminal laws is no response to the fundamental purposes of the presumption." *Ibid.* Contrary to the Government, there is "no reason that these concerns are less pertinent in the criminal context." *Ibid.*

B. Statutes Providing for Civil and Criminal Liability Can Have Only One Authoritative Meaning

The Government's contention also contradicts the simple and commonsense principle of statutory interpretation that "[a] single statute with civil and criminal applications receives a single interpretation." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 727 (6th Cir. 2013); *see H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws."); *see also Vilar*, 729 F.3d at 74 ("The presumption against extraterritoriality is a method of interpreting a statute, which has the same meaning in every case."). If Congress intended to abrogate this rule for a hybrid statutory provision such as § 1962, it could have simply written that distinction into the statutory text. It did not.

If the words of a statute are to comport with the rule of law, they must have the same meaning whether the statute is used in a civil or criminal context. As relevant here, "there is no compelling justification for a court to give two constructions to a single statute—a domestic one for civil actions, and an extraterritorial one for criminal prosecutions—

based solely on the nature of the underlying proceeding." David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After* Morrison *and* Kiobel, 45 LOY. U. CHI. L.J. 71, 78 (2013).

This interpretative principle controls even where a particular canon of construction governs only some applications of a statute, but not others. As this Court has explained, "it is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The *lowest common denominator*, as it were, must govern." *Clark v. Martinez*, 543 U.S. 371, 380 (2005) (emphasis added).

For example, the principle that a statutory provision can only have one meaning is illustrated in cases applying the rule of lenity, which holds that any ambiguity concerning the ambit of criminal statutes should be resolved in favor of the defendant. Even though the rule of lenity applies to only criminal *statutes*, its application is by no means confined to criminal *cases*. Instead, this Court has consistently applied the rule of lenity in *civil* cases implicating the scope of statutory provisions that enjoy both criminal and civil applications. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004) (Immigration and Naturalization Act); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 408-09 (2003) (Hobbes Act); *United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (National Firearms Act); *Crandon v. United States*,

494 U.S. 152, 158 (1990) (federal contractor conflict-of-interest law).

In other words, the rule of lenity "is *not* a rule of administration calling for courts to refrain in criminal cases from applying statutory language that would have been held to apply if challenged in civil litigation." *Thompson/Ctr. Arms*, 504 U.S. at 518-19 n.10. Rather, it "is a rule of statutory construction whose purpose is to help give authoritative meaning to statutory language." *Ibid.* Thus, when a statute like RICO provides for both civil remedies and criminal penalties, it is "inconceivable" for "the language defining [a] violation to be given one meaning (a narrow one) for the penal sanction and a different meaning (a more expansive one) for the private compensatory action." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 297 (2012); *see FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954) ("There cannot be one construction for the [FCC] and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.").

This understanding also "vindicates the principle that only the *legislature* may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (statement of Scalia, J., respecting the denial of certiorari) (citing *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820)). That is one reason why ambiguous criminal statutes must be

narrowly construed, so that the federal courts avoid "making criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008).

As the Court has repeatedly explained, "we must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Leocal*, 543 U.S. at 11-12 n.8. To hold otherwise, as the Government urges, "would render every statute a chameleon" and "would establish within our jurisprudence ... the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark*, 543 at 382, 386.

III. IN THE WAKE OF *KIOBEL*, ACTIVIST PLAINTIFFS ARE EXPLOITING CIVIL RICO AS A SURROGATE FOR CLAIMS THAT THIS COURT FORECLOSED UNDER THE ALIEN TORT STATUTE

Giving extraterritorial application to a statute of RICO's breadth would also enable plaintiffs to circumvent the important territorial limits that this Court has recently recognized in the Alien Tort Statute (ATS), 28 U.S.C. § 1350, which authorizes federal courts to hear claims brought by aliens for only a "modest number of international law violations." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004).

The ATS existed for over 200 years but was rarely used until 1976, when a cohort of enterprising plaintiffs' attorneys seized on the law to sue a former Paraguayan police chief on behalf of two Paraguayan nationals for the kidnap, torture, and murder of

their son—in Paraguay. That lawsuit resulted in the Second Circuit's 1980 decision in *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which expressly enabled alleged victims of human rights violations to bring suit in federal court.

For decades following *Filartiga*, human rights activists routinely relied on the ATS as their vehicle of choice to sue multi-national corporations for alleged overseas violations of the "law of nations," and many lower federal courts interpreted the ATS to permit a global remedy for international law violations. *See* HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 35 (2008) (stating that the Second Circuit's *Filartiga* decision "spawn[ed an] entirely new way[] of looking at the law" and "triggered a wave of academic scholarship and more than a quarter-century of human rights litigation in U.S. courts").

This Court's recent decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), not only rejected the notion that the ATS creates a global cause of action, but it did so unanimously. Requiring dismissal of plaintiffs' claims against foreign defendants based on the actions of a foreign government in its own territory, the Court held that nothing in the text, history, or purpose of the ATS suggested that Congress intended to override the venerable presumption against extraterritorial application of U.S. law. 133 S. Ct. at 1665-69. The Court held further that "even where [ATS] claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669.

Once the Court granted certiorari in *Kiobel*, "litigators in the broader [human rights] community appear[ed] to be undergoing a recalibration—a search for alternative vehicles by which to sustain the momentum in litigating involvement in extraterritorial abuses." Julian Simcock, *Recalibrating After* Kiobel*: Evaluating the Utility of the Racketeer Influenced and Corrupt Organizations Act (RICO) in Litigating International Corporate Abuse*, 15 CUNY L. REV. 301, 304 (2012); *see also* Eric Allen Engle, *Extraterritorial Jurisdiction: Can RICO Protect Human Rights?*, 3 J. HIGH TECH. L. 1, 10 (2004) (proposing "the use of RICO to supplement and fortify claims under [the ATS]").

Indeed, "the well-documented flexibility of RICO as a tool for ascribing liability to individuals who are removed from the direct perpetration of crimes has led some commentators to suggest that the Act may be an appropriate vehicle by which to pursue corporate involvement in international abuses." Simcock, *supra*, at 306. Moreover, "[a] certain similarity exists between RICO and the [ATS]: both import foreign substantive law as the basis of a new independent federal claim." Engle, *supra*, at 9. Most traditional human rights abuses, such as murder, robbery, bribery, extortion, etc., all easily qualify as predicate offenses under RICO. *Ibid.*

"Many of the claims that have been brought under ATS cases (and other human rights litigation) are featured as predicate offenses under RICO as well." Simcock, *supra*, at 310. Indeed, it is rather telling that some of the most far-fetched ATS lawsuits also included RICO claims. *See, e.g.*,

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of a quorum*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (asserting ATS and RICO claims against 50 corporate defendants for their "complicity" in South African apartheid); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011) (asserting ATS and RICO claims against U.S. military contractors in connection with alleged abuses at a military prison in Iraq).

Such ATS and RICO claims are sometimes dismissed by the district court on forum non conveniens grounds, only to be reinstated later on appeal. *See, e.g.*, *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000) (suit by Nigerian citizens against Dutch and British holding companies alleging human rights abuses stemming from oil exploration in Nigeria). Others survive the pleadings stage but are later disposed of on summary judgment—*precisely* on the ground that RICO does not apply extraterritorially. *See Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (suit by Myanmar citizens against Myanmar government and government-owned oil company alleging human rights abuses in furtherance of an oil-pipeline project).

If this Court were to affirm the Second Circuit's deeply flawed decision below, it would effectively authorize activist plaintiffs to litigate under RICO the very same factual allegations that *Kiobel* now bars them from pursuing under the ATS. As a result, claims that would have little or no settlement value as ATS claims would provide, when recast as civil RICO claims seeking treble damages,

even greater leverage against defendants than that available under the ATS. Such a substantial risk of protracted litigation and ruinous damage awards will discourage legitimate businesses from engaging in perfectly legitimate market activity that *might* subject them to suit here.

CONCLUSION

For the foregoing reasons, *amici curiae* Washington Legal Foundation and Allied Educational Foundation respectfully request that the Court reverse the decision below.

Respectfully submitted,

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